No. 12620

Supreme Court of Illinois

Parmelee, et al.

---

vs.

Hambleton, et al.

United State of America }
State of Illinois }
County of Cook } SS.

Pleas before the Honorable John M. Wilson, Judge of the Cook County Court of Common Pleas within and for the County of Cook and State aforesaid at a Special Term of the Cook County Court of Common Pleas, begun and held at the Court House in the City of Chicago in said County in pursuance of an order of the Judge thereof, and to public notice given in accordance with the Statute in such case made and provided, on the Second Monday being the Ninth day of November in the year of our Lord one thousand Eight hundred and fifty seven and of the Independence of the United States the Eighty Second.

Present the Honorable John M. Wilson Judge
Lewis Ward Prosecuting Attorney
John L. Wilson Sheriff
Attest Walter Kimball Clerk

Be it Remembered, that on the Twelfth day of August A.D. Eighteen Hundred and fifty seven, there was filed in the office of the Clerk of the Cook County Court of Common Pleas, a Transcript of Record in the words and figures following, to wit

United States of America
State of Illinois } Ss. Monday
Cook County } April 13th 1857.

Pleas before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and presiding Judge of the Circuit Court of Cook County in said State at a trial Term thereof begun and held at the Court House, in the City of Chicago in said County, on the Second Monday being the Thirteenth day of April, in the year of our Lord one thousand eight hundred and fifty seven, and of the Independence of the United States the Eighty first.

Present Honorable George Manierre
Judge 7th Judicial Circuit
John L. Wilson Sheriff of said County
Carlos Haven State Attorney
Attest Wm. L. Church Clerk

3

And afterwards, to wit, on the Fifteenth day of April. the same being one of the days of the April trial term of our said Court among other proceedings, the following Order was had and entered of Record,

Joseph W. Hambleton
vs Daniel Goodman
et al
Franklin Parmelee.
Liberty Bigelow. David A.
Gage & Walter S. Johnson

Petn for Mech Lien.

This day come the said parties by their attorneys, and the Court having heard Counsel on the said defendants Demurrer to the said Plaintiffs Petition herein, and being well advised in the premises. sustains the same with leave to the said plaintiff to amend;

And afterwards, to wit, on the Third day of July in the year last aforesaid the same being one of the days of the June Special Term of our said Circuit Court. the following among other proceedings in said cause was had and entered of Record in this cause. to wit

4

Joseph W. Hambleton
Daniel Goodman
vs
Franklin Parmelee Liberty Bigelow. David A. Gage and Walter S. Johnson

Petn for Mech's Lien

On reading and filing the Petition of the said Defendants verified by Affidavit. and on motion of W. K. McAllister their Attorney it is.

Ordered that the venue of this cause be changed from this Court to the Cook County Court of Common Pleas. and that the Clerk certify under the Seal of this Court. a Complete Record of the proceedings had herein. together with the papers filed in this cause. to the Clerk of the said Cook County Court of Common Pleas, and it is further ordered that said defendants pay the costs of said change of venue.

State of Illinois }
Cook County } ss. I. William L. Church Clerk of the Circuit Court of the County of Cook in the State aforesaid do hereby certify that the above and foregoing is a true and Complete transcript of all the orders of said Court made and entered of Record in the

5

foregoing entitled cause, and I do further certify that the accompanying papers lettered from A. to F. inclusive are all the papers filed in our said Circuit Court relating to the issues in said cause.

In Witness Whereof I have hereunto set my hand and affixed the Seal of our said Circuit Court at my office in Chicago this 12th day of August A.D. 1857

Wm L. Church Clerk

Seal

And afterwards, to wit, on the same day and year last aforesaid, there was filed in the office of the Clerk of said Court County Court of Common Pleas a Petition, Precipe, Summons & Answer ~~Replication~~, which said papers are in the words and figures as follows, to wit,

State of Illinois }
Cook County } ss.

To the Honorable George Manierre Judge of the Circuit Court of Cook County,

X

The Petition of Joseph H. Hambleton and Daniel Goodman respectfully shows unto your Honor. That your Petitioners are Masons by trade, and are

L12620-3

partners doing business in the City of Chicago in said County under the name of Hamblton & Goodman;

That Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnson, on and before the 27th day of May 1856, possessed and occupied a certain parcel of land situate in Chicago aforesaid, and described as follows, to wit, Bounded on the North by Randolph Street, on the West by State Street, on the South by the brick barn of Frank Parmelee & Co. and by the lot lying next South of said barn, and on the East by said barn and by an alley, being about one hundred and twenty four feet on State Street, by about one hundred and fifty one feet on Randolph Street, which lands were and are held by them under and by virtue of certain leases before then made by the owners of the above described premises for a long term of years, which term will not expire for a number of years yet to come, That on or about the said 27th day of May, the said Parmelee, Bigelow, Gage and Johnson by their Company name of "Frank Parmelee & Co." made and entered into a contract in writing with your petitioner of which contract the following is a copy viz—

97

These Articles of Agreement, made and entered into this 27th day of May A.D. 1856, between Hamblton & Goodman of the first part building Contractors of the City of Chicago, and Frank Parmelee & Co. of the same place, of the second part Witnesseth,

That the said Hamblton & Goodman or Executors administrators and assigns, for and in Consideration of the payments hereinafter to be made to them by the said F. Parmelee & Co. or their legal representatives, do on their part Contract and agree to build, finish and complete in a careful, skillful, and workmanlike manner, to the full and complete satisfaction of Wm H. Boyington or assistant Superintendent and by and at the times mentioned in the foregoing Specifications, the Masons and Stonework of a five story and basement block of Store and offices, that is to be erected on the corner of Randolph and State Streets, as aforesaid, so as fully to carry out the designs of said work, as it is set forth in the foregoing Specifications, and the plans and drawings therein especially referred to. Said Specifications and plans and drawings being hereby declared part & parcel of this Contract,

And the said Frank Parmelee & Co. or their Executors Administrators or assigns,

$126.00-4

for and in consideration of the said Hamble-
ton and Goodman doth fully and faithfully
Executing the aforesaid work, so as to fully
carry out the design for the same, as set
forth by the specifications, and accordingly
the true spirit, meaning and intent thereof.
and to the full and Complete satisfaction of
Wm W. Borgington or his his assistant Superin-
intendent as aforesaid, and at the times men-
tioned in the foregoing specifications doth
hereby agree to pay the said
the sum of Twenty Thousand Three Hundred
and Seventy four dollars $ 20.374.00, in
the manner following viz. As the work
progresses, the Superintendent is to make out
estimates from time to time, of the work and
materials inwrought into the building and
upon presentation of a certificate from said
Superintendent of eighty five per cent on said
Estimate, the said Frank Parmelee & Co. or
their legal representatives are to pay the a-
mount from time to time, and the balance
fifteen per cent is to be paid, together with
any other balance that may be due to said
Hamblelon & Goodman, upon the completion
of the contract as aforesaid, provided the
said Superintendent shall certify in writ-
ing that they are entitled thereto.

In Witness Whereof the

parties hereto have set their hands the day and year above written

(Signed.) "Hamblelton & Goodman"

"Frank Parmelee &c."

That the specifications mentioned in the said contract is hereto annexed and marked "Schedule A." and is made a part of this petition. Excepting however that the words in said specifications contained under the head of "damages" and relating to unavoidable delays, were added some few days after said 27th day of May, with the consent and by the directions of the parties to such contract, and for the purpose of making such addition a part of such contract.

And your petitioners further show that the premises first above described, and which are hereinbefore stated to have been possessed and occupied by the said Parmelee, Bigelow, Gage & Johnson are the same premises referred to in the said contract and specification, and are the same lands and premises upon which your petitioners performed the work, furnished the material and put up the buildings as hereinafter stated.

And your petitioners further show that immediately after making such

10

Contract. they proceeded to the performance of the same. on their part. and did all the work and furnished all the materials. to be by them done and furnished according to the provisions of such Contract. and would have completed the work and the several parts thereof, within the times specified in such contract if they had not been prevented by causes of delay that were unavoidable on their part. and if they had not been delayed said Frank Parmelee & C. and if they had not been obliged to wait for certain iron work and Castings which were to be furnished. and which were finally furnished by the said Frank Parmelee & C. That your Petitioners were obliged to wait for lintels to be placed over the iron Columns. and for the iron window Caps and Sills, and for the stone sills of the South tower. and for the Carpenter work to be done and for the building to be shut up and warmed. so that the plastering would dry.

Your Petitioners further shew unto your Honor. that by reason of the neglect of the said Frank Parmelee & C. in the particulars above mentioned. and by reason of the said delay consequent thereupon. your petitioners were put to great expense and suffered great loss and damage. inasmuch as

they could not keep their men at work to advantage, and the men were frequently idle for
11 want of work, and your petitioners were obliged from time to time to discharge their men and then to hire again at higher wages, and were obliged to complete the job when the days were short, and during the cold weather of the Fall and Winter, when it necessarily cost them a much larger sum than it would if they could have done such work at the time contemplated when such contract was made, which loss and damage so sustained by your petitioners amounts in the aggregate according to the best judgment of your petitioners to the sum of Ten Thousand Dollars, besides the sum of $86.62, a claim for money paid, as herein after mentioned. That your petitioners frequently complained to the said Frank Parmelee & Co. and to their architect and agent, the said Borgington of such delay and notified them of the damage which your petitioners were sustaining in consequence thereof.

Your Petitioners further show unto your Honor that at the request of the said Frank Parmelee & Co. and under the direction of the said Superintendent they furnished material and performed

$1262.67

12

work in addition to that which was specified in the contract, of the value of Five Hundred Dollars or thereabouts.

Your petitioners further show that they made an agreement with one William Ford, by the terms of which agreement he was to lay up the front wall of the building, and he employed a sufficient number of workmen and would have completed his job in the month of August if he had not been delayed through the default of the said Frank Parmelee & Co. in the particulars above mentioned, that his men were frequently without work and he was on several occasions obliged to dismiss a number of them, while waiting for said iron work. That finally the said Frank Parmelee & Co. either personally or by their said architects, requested that the said Ford should retain his workmen, and promised to pay their wages for such time as they should thereafter remain idle for want of ironwork to be furnished by said Frank Parmelee & Co. That pursuant to such request, the masons and laborers were retained and paid by said Ford and your petitioners for time that they were idle from the 22nd to the 26th of September, the sum of Eighty six dollars and Sixty

two cents.

13

And your petitioners further shew unto your Honor, that your petitioners having at length fully completed their job, and having faithfully kept and performed the said Contract on their part, did on or about the 1st day of March last past present to the Architect and Superintendent, the said Wm H. Boyington, their accounts and Claim for the extra work and materials which they had so done and furnished, as above mentioned, which accounts also included the items of the said Claim of $86 62/100, being for money paid at the request of the said Frank Parmelee &c. as above stated. That your petitioners and the said Boyington took over such accounts and made divers corrections in the same, and mutually agreed that the amount due thereon unto your petitioners for such extra work and materials, was the sum of $497. and that the said sum of $86 62/100, was also justly due to your petitioners. That thereupon your petitioners applied to the said Boyington to give them a final Certificate for the balance due them of the price mentioned in said Contract, and also for the amounts due for such Extra work and materials & for said money paid.

And your petitioners further shew, that

7

on the 9th day of March last past, the said Boyington delivered unto your petitioner a certificate of which the following is a copy, viz.

Chicago March 9th 1857

I hereby Certify that I have carefully examined all the variations from the contract by which Messrs Hamilton & Goodman on the 27th day of May A.D. 1856, agreed to do the masonry and stone work & furnish materials for a block of stores and offices situated on the corner of State & Randolph Streets for Messrs F. Farnsley &c. I find that Messrs Hamilton & Goodman are entitled to an allowance of four hundred and ninety seven dollars for various Extra work $6,$497.00

Amount of Contract 20,374.00

$20,871.00

Messrs Hamilton & Goodman are also deficient in point of not fulfilling contract & work charged, making some parts less than was called for in the contract viz.

For Brick work & plastering omitted 68,74

" brick arch side walks 5 00.00

" Twenty days delay in finishing the building as provided in contract 2000.00 2568.74

$18,302.26

Payments as per Certificates from time to time 15,885.00

$2417.26

Wm H. Boyington
Superintendent

15

Your petitioners further show that they at once appealed from the decision of the said Boyington, as will appear from the following notice which they served upon the said Frank Pamelee & Co. and upon the said Boyington on the 12th day of March.

Gentlemen.

Having fully performed on our part the contract entered into on the 27th day of March 1856. with Frank Pamelee & Co. we applied to Wm H. Boyington the Superintendent for a final certificate in order that we might obtain the balance due us. On the 9th day of March instant. he delivered to us a certificate in which he, among other things professes to decide and certify that we are "deficient in point of not fulfilling contract and work charged. making some parts less than was called for in the Contract. to wit"

"For brick arch side walks 500.00

Twenty days delay in finishing the building as provided in Contract 2000.00"

Thereby leaving the balance due us only $2417.26

We claim that whatever damage or loss may have been sustained in relation to the brick arch side walks. resulted from a defective design furnished by said Superintendent. and that whatever delay there was in finishing the building was unavoidable on our part

16

and was caused by you or by some of yours.

You will please take notice that we hereby protest against the above mentioned decision of the said Superintendent, and as provided for in said Contract appeal from such decision to an arbitration, to be chosen in the following manner, and we propose an arbitration the following named persons, to wit. Thomas Milner, Levi H. Waterhouse & William H. Canton, each of whom is, as we believe disinterested, and fully competent to act as such arbitrators. If you are willing to submit to such arbitration please notify us or our attorneys hereinafter named of such willingness without delay, so that we may if possible agree with you upon the persons to act as arbitrators. Our attorneys above referred to are Messrs Goodrich Farwell & Smith, whose office is 49 Clark Street. If you do not on or before the 16th instant, notify us or our attorneys of your willingness to submit to such arbitration, we shall consider that you refuse to arbitrate, and we shall be compelled to commence suit to enforce our claim against said Frank Parmelee & Co.

Dated March 11th 1857

Very Respy Yours &c.

Hambleton & Goodman

To Messrs Frank Parmelee & Co.

Wm H Bowington

Your petitioners further show, that after such certificate was given by said Boyrington as aforesaid, they called on him and inquired of him, why he had neglected to include in said Certificate the said sum of $86 62/100, and he admitted that it was omitted by mistake, and then gave them a separate Certificate for that amount, which amount the said Frank Parmelee & Co. afterwards paid to your petitioners. Your petitioners further show that it is true as was in said notice stated, that whatever damage or loss was sustained in relation to the "brick arch side walks" resulted from a defective design furnished by said Barrington, and that the work done by your petitioners was done well and in strict compliance with the contract, and according to the designs furnished, that the said brick arch side walks were nearly completed, when they gave way and it was evident that arches built according to such design would not be sufficient, and your petitioners were directed not to complete them but were told that they must remove the materials provided and used for such arches, which instructions by said Boyrington your petitioners followed.

Your petitioners further show that although the said Frank Parmelee & Co. after receiving such notice, at first Con-

desired to such arbitration, and agreed with your petitioners upon persons to act as arbitrators with the said Frank Parmelee & Co., finally concluded not to submit to such arbitration. That on the 25th day of March the said Parmelee called at the office of the said Attorneys, and informed them, that the persons whom they had named were not willing to act, that they (the said Frank Parmelee & Co. meaning) had not been able to find suitable men who would act as arbitrators in the matter: that they had concluded not to try any further, and that they had rather leave the matter to the decision of twelve men, than to any three men they could be able to get.

Your petitioners therefore claim, that the said Frank Parmelee & Co. are justly indebted to your petitioners as follows, viz.

The balance of the price mentioned in the Contract after deducting all payments, and also deducting the said sum of $68 74/100 for brick work and plastering omitted, and also allowing for the materials taken from the brick arch side walks, and for the value of the work remaining to be done on the said side walks, when your petitioners

were instructed not to complete
them $150. $4260.26
19 For Extra work & Material 497.00
For damages sustained through
the default of said Frank Parmelee
& Co. as above set forth. 2000.00
Total $6,757.26

Your petitioners further show that the said Frank Parmelee & Co. refuse to pay to your petitioners the above mentioned sum, or any portion thereof, although often requested to pay the same.

Your petitioners further show that as they are advised and verily believe they have a lien upon the said land and upon the leasehold interest of the said Frank Parmelee & Co. in and to said land, and upon the said buildings, for the sum so due them as aforesaid, and they ask the aid of this Honorable Court in the premises, and pray that such lien may be enforced, and that a Judgment or Decree may be made directing the sale of said leasehold interest, and of said buildings, and of all the right title and interest of the said Parmelee, Pingree, Gage and Johnson in or to the said land and buildings, to pay the sum due to your petitioners as aforesaid, and that such other, further, or different order or decree may

[illegible]

be made in the premises as to your Honor shall seem meet, and as shall be agreeable to equity.

Your petitioners further pray that a summons may issue from this Court directed to the Sheriff of Cook County, to summon the said Franklin Parmelee, Liberty Bigelow David A. Gage and Walter S. Johnson, returnable to the next term of this Court, to cause them to appear and answer this petition.

Dan'l Goodman

Goodrich Farwell & Smith
Solrs for Petitioners

Joseph W. Hambleton

State of Illinois }
Cook County } ss. The above named Joseph W. Hambleton & David Goodman being severally duly affirmed, each for himself doth say that he has heard read the foregoing petition, and knows the contents thereof, and the same is true according to the best of his knowledge and belief

Affirmed to before me
this 2nd day of April 1857 }
Wm L Church Clk

Joseph W. Hambleton
Dan'l Goodman

21

"Schedule A."

Specifications for the Masons

Works and Materials required for the Erection and Completion of a Block of Pressed Brick Stores and offices that F. Parmlee & Co. are about to have built on the Corner of State and Randolph Sts. in front of and in connection with the walls of the Omnibus Barn.

Special Reference will be had by the Contractor to the following Specifications, and the accompanying designs, as made by Wm. H. Boyington, Architect, and which consist of the following drawings, viz.

Plan of Foundation, Vaults under walk
" " Basement
" " Main Floor
" " Second "
" " Third & Fourth floors will be the same as the second floor. Fifth floor will be only finished in Towers.

Duties of Contractor: He shall be strictly held to make such Work, and to use such Materials, as is hereinafter described, and to work up the Building to the given Designs, and in all cases where the drawings are figured, the figures must be taken by him.

[illegible]

as the given dimensions, without reference to what the drawing may measure on its scale. He will be further held to submit, as to the character of the Materials used, and the Work done, to the judgment of the Superintendent; and to procure from him all necessary interpretations of the Design, and all necessary certificates, regarding his payments.

Superintendents and their Duties.

Boyington & Whitlock, or assistant Architects are declared to be the Superintendents of the Work for the Owners; Their duties will consist in giving on Demand, such interpretations, Either in language, writing or drawing, as in their judgment the nature of the work may require, having particular care that any and all work done, and Material used for the Work, be such as is hereinafter described, in giving, on demand any certificate that the Contractor may be entitled to, and in settling all deductions of, or additions to the Contract price, which may grow out of alterations of the design, after the same is declared to be Contract, also determining the amount of damages which may accrue from any cause, and to particularly decide upon the fitness of all Material used and Work done.

The Contractor being bound

in all cases, to remove all improper Work or Materials, upon being directed so to do by the Superintendent.

But the Contractor if after having been directed as above to remove the same, should refuse or neglect so to do, shall not only suffer a deduction from the Contract Price of the Difference in Value of proper and improper Work and Materials, but shall also be Liable for all Damages of Whatsoever Nature or Kind that may result from such Cause. The above Provision to apply in the same way to all materials or Work used, made or fixed, without the Knowledge of the Superintendent.

And it is hereby expressly provided, that in case the Contractor should feel aggrieved by the decision of the Superintendent, an appeal may be taken from such decision, to an arbitration Chosen indifferently, and whose decision in the matter shall be final and binding on all parties.

The owner reserves the right to alter or modify the Design, and to add to, or diminish from the contract price, the difference to be adjusted as provided above.

The owner being bound in all cases, to recognize the act of his Superintendent, not only as regards extra work

but also to the sufficiency of the Design, the Contractor being in no case responsible for any accident resulting to the work from a defective design. Which fact must be determined by an arbitration of three disinterested men, chosen indifferently, and if found that the damages resulted from a want of proper care on the part of Contractor, then and in such case the damages and loss shall be paid for and made good by him, but if found that the accident or damage resulted from an improper design, then and in such case, all damages shall be sustained by owner, which in all cases must be Real, and in no case Constructive Damages to be allowed.

All payments made on the work during its progress are on account of the Contract and shall in no case be construed as an acceptance of the work executed, but the Contractor shall be liable to all the conditions of the Contract, until the work is accepted as finished and Completed.

Dimensions of the Building as represented by, and figured on the drawings.

Heights.

Basement Story 8' (Eight) (more or less) to be 6'-6" feet
Principal do do 15' 3" do
Second do do 12' 3" do

Third do. ——— do 11'-3"- do

Fourth do ——— do 10'-3"- do

Fifth do ——— do 15'-0"- do

For depth of foundation below the cellar bottoms see Sections & plans.

This Building is intended to be thorough in every particular, and must be finished throughout as hereinafter described, and anything shown by the drawings and not hereinafter particularly referred or described which is necessary to complete the masons materials and work of the building, is to be done at the cost of the Contractor, notwithstanding such omission

Grade of Building

Top of first floor of joists to be fixed twenty one inches above the new grade of side walk.

Excavations

The entire area of the proposed Building as required by Plans, to be dug out to the required depth for cellar & basement bottom by proprietors. Excavations for footings of walls to be dug by Contractor below the first named excavation. All other excavations for drains and cisterns and for foundations of piers, and for vaults of water closets, as required by plans to be dug by the Contractor. All the excavated earth to be disposed of by the proprietors. Contractor to properly level off the earth about

the walls. so as to turn the water from the walls, and refill the excavations for drains, after the same is put in and properly fixed. the drains will all be led into the Sewer that now passes from the barn to State st. Tile drain pipes will be furnished and laid by the proprietors after the trenches are dug, and cesspools properly arranged by the person putting in the drain pipes. so as to drain each Basement and Cellar under the walks seperate.

Rubble Stone Work

All walls shaded blue to be of stone, of dimensions and heights figured on the drawings, and composed of good quarry stone, laid in the best manner, with mortar mixed of proper proportions of best lime, and clean coarse sand, the whole to be well Bedded and Bonded together, and well faced on both sides.

Dwarf Walls to have stone foundations, same kind of work as above specified, between main piers, same depth and average twenty four inches thick, laid in cement mortar. all stone walls to be laid in cement mortar one foot above the basement floor, outside walls to Cellars under the sidewalks will be laid in cement full height.

Footing of wall for piers on front from the bottom of trenches to be composed of large

27

stone, and will be three feet high and five feet 6" wide, the first course or layer must not be less than twelve inches thick by thirty feet square surface, and must be well settled in the earth by a heavy instrument of wood, and laid in a mortar made of two parts sand to one of Water lime upon the first stone there will be two more courses 10" to 12" each 4' x 4' & 3' x 3' thoroughly fitted together, and bedded in fine mortar as above, the top of the top stone will be dressed with square edges. Piers in the cellar for partition walls 3 ft deep built of good square stones, and the top of each to be covered with a stone at least 10" thick. Bearing walls for the support of the arches and side walk will be as shown in plans & sections. Foundations for support of the iron columns in the cellars under walks will be composed of large stone, one stone to each layer & well fitted together.

The top of the piers for the joints to rest the iron columns upon will be dressed and squared suitable for staging surface

The same kind of stone will be used for the foundations of Iron columns for the interior of basement, and laid in same way. All necessary holes to receive timbers and joists must be cut in the brick and stone work of old walls by contractor for masonry. Walls of areas to be of stone, for hight and thickness, see section and plan. The face of which must be laid in courses with good

bonds, and coarse bush hammered face, all door and window openings left where shown on plans, with returns, stone jambs & stone caps & sills.

All proper holes left for drains and gas pipes as directed, or shown by Plans.

Cut Stone

For the quality and kind, reference will be had to the accompanying description and drawings. where the same is plainly described and shown, and must all be properly set, and after the walls are finished to be properly cleaned off and pointed up.

All stone piers shown on basement plan must be composed of good square blocks, well cut on all sides, medium bush hammered with 1½ inch border, well laid in fine mortar to the right height to rest the columns upon. there will be no stone door sills.

There will be a belting course of cut stone 6 inches thick laid in connection with the stone sills to the first tier of windows above the stores, with a drip cut on under side. this belt course will project 2½ inches and lay in the wall at least 6 inches, and at the windows full width for sills of six panels. under this belt of stone will be a strip of sheet lead 8" wide laid in the wall solid & furnished by the mason, projecting

29

out for the purpose of making water tight over cornice and balcony. The stone piers dividing the store fronts on both Streets, will be formed in blocks thirteen inches deep into them with rustic joint, fine bushhammered face with fine miter border, all neatly trimmed, and laid up with a fine joint of mortar, up to the right height for the lintel of store fronts.

Brick Work

All Walls shaded red on the plans are to be of bricks of the thickness and size marked on plans, laid in the best manner, with solid heads and bed joints, and slushed solid every two courses. The cellars under the walks will be formed with 12 in cross skew back brick arches, from which four inch brick arches will be turned, and all laid in cement mortar composed of two parts sand, to one of cement. The cross arches will be anchored with 1 inch round iron, with nuts and washers at each end. The washer on the area side will be four feet long, let into the face of the wall, size 1/2 x 2 1/2 with 3/4 bolt at bottom through the wall.

All brick used for facing the outside walls must be hard burned, all soft brick to be rejected from the work. The face will be red pressed brick, on both Streets, close jointed & tuck pointed. Tower walls to extend,

The window jambs & Casings outside for the last story of Tower will be formed of brick and molded on all sides exactly like the south side of court Tower. There will be three of these Towers, one to each corner of the building.

30

above the roof of main building on all sides. the inner sides to each will be commenced on trusses from the ceiling of fourth story. these towers walls will be eight in. thick above the fourth story. Owners will furnish at the time they are wanted in all cases when the roof is to be of Tile and Composition. a sufficient amount of 2 x 4 inch Scantling to surround the whole roof of building, and which must be be built in the fire walls by Contractor in such manner as the lower side of the piece will be flush with the top of the roof boards.

All Chimneys to be built as shown by drawings, and in all cases where the flues pass through the floorings, the brick work must project out 4 inches so as to form at least 8 inches between the timbers and smoke flues, all the flues to be smoothly plastered on the inside, and have stone tile thimbles with tin stoppers as directed, and be finished above the roof, at least one foot above the highest point. There will be brick arch window caps to all the windows of the fourth story. Diamond Cast to be worked in all the joints of the brick of the outside walls of the different stories, one to each 12th Course. Contractor to Execute all the masonry and furnish all the materials necessary for setting Bank Vault in the corner room.

and all necessary iron anchors and stone lining for same. Iron grating for ventilation 8 x 12 inches, to be worked in the outside walls with connecting flues to reach the basement under walks. The Contractor for the masonry will set all stone and iron window caps & sills in a thorough manner,

31

Iron Anchors

For each of the piers, and for at least every ten feet of the dead walls, to be carefully worked in the masonry, and secured to the timbers of each of the floors and roof. There will be 1/2 by 2 1/2 wrought Iron Anchors extending on top of stone piers and let into the same on both fronts, and will extend the whole length of both fronts over openings except when oak timbers are to be put in.

These anchors will be all Pin Anchors, made to wit, Pin 8 inches long of 7/8th round iron, the Shank to be 24 inches long properly welded around the Pin, and will be fastened to the timber with two spikes. Size of Iron 1/2 x 1 1/2.

Those for the Stone Lintel of Fronts to be extra heavy, and must be long enough to reach the third joist from the stone or timber to be anchored. Straps of 1/2 x 1 1/2 Iron to be placed on the timbers of all the floors and

The Iron Anchors for the Jambs & mullions to be turned down into the stone one inch and heads each other set at least 1 inch so to prevent splitting the stone — Iron to be let in flush of the top of stone —

[12680-16]

roof where the band lie upon and meet on division walls. these straps must be 20 inches long American Iron, and have 4 spikes each, with ends turned down into timbers. All main timbers that connect with the old wall, or every ten feet of joists must have the same kind of anchor, extending through the wall, with a nut on inside of wall.

Plastering

All throughout the building to be of the best quality Plaster of Paris finish. All three coat work, except the basement fourth and fifth stories, which will be two coat. All Brown Mortar must be composed of suitable proportions of clear sharp sand, quick fresh lime and hair, each of which must be put on at proper proportions and times. The finishing coat must be thoroughly polished, with plumb angles and true corners.

The contractor for the masonry will be held responsible for a perfect job of plastering, and all places that may have been damaged or bruised by carpenters or otherwise must be made good by the mason, without extra charge.

Finally the whole job to be fully completed in a careful, skillful and

workmanlike manner, and every material to be furnished therefor, and anything shown by the plans relating to, or is necessary to complete the masonry of the building, and not hereinbefore particularly referred or described, is to be done at the cost of the Contractor notwithstanding such omission

Time

Owner to give possession of the ground on or before the 26th day of May A.D. 1856. Contractor must agree to build the walls and chimneys ready for roof on or before Sept. 22d 1856, and fully complete the plastering of the building within forty five days after the same is declared by the Superintendent ready for lathing, and must complete the whole of masonry within one hundred and fifty days after the first above mentioned time.

Said work in no case shall be considered as finished, unless the same is so reported to the Superintendent and accepted by him

The owner hereby agreeing to have in readiness all necessary timber, & Carpenters Work &c. they may be wanted, so that in no case the masonry shall be hindered for the want of the same, and will put on each floor of joist on all the Building within days after the walls are made

ready to receive the same, and in case he should fail to do so, then and in such case he hereby agrees to extend the time for finishing said work, in a Pro. Rata proportion for such delay, and will also pay all damages resulting to the Contractor from such cause of delay. Provided, the Contractor shall at the time of such delay, notify the Superintendent in writing of the extent thereof, and the damages to him arising therefrom, and if required by owner must prove the same.

Damages

And in order to secure the execution of the work in the manner, and at the times specified, it is hereby distinctly declared, that the Damages arising from the non fulfillment of the Contract, as regards time shall be one hundred dollars per day, for each and every day the work remains unfinished, and which sum of Damages shall be deducted from the Contract price as Eliquidated damages. The object of the above is to guard against delays that can be avoided. (but unavoidable delays excepted.)

Payments

To be made on the work as may be hereafter agreed.

Cook Co. Cir Ct

35

Joseph W. Hambleton v
Daniel Goodman
vs
Franklin Parmelee
Liberty Bigelow
David A. Gage and
Walter S. Johnson

Mechanics Lien

The Clerk will please issue Summons to Sheff of Cook Co. returnable to next term of Court & oblige

Goodrich Farwell & Smith
Sols for Petitioners

Apl 2nd 1857.

State of Illinois }
County of Cook } ss.

The People of the State of Illinois to the Sheriff of said County — Greeting:

We command you that you summon Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnson, if they shall be found in your County personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House in Chicago in said County on the second Monday of April inst. to answer unto Joseph W. Hambleton v Daniel Goodman.

Sizeman

in their Petition for a Mechanics Lien filed in this Court.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness William L. Church Clerk of our said Court and the Seal thereof at Chicago aforesaid this Second day of April A.D. 1857.

(Seal)

Wm L. Church Clerk

Endorsed.

Served by reading to the within named Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnston, by delivering a copy hereof to each of them, the 20th day of April 1857.

John L. Wilson Sheriff
By John McDark Deputy

Cook County Circuit Court

The Answer of Franklin Parmelee Liberty Bigelow, David A. Gage & Walter S. Johnson, Defendants to the Petition of Joseph W. Hambleton & Daniel Goodman Petitioners in the said Petition against the defendants aforesaid. And the said defendants answering said Petition say that they admit that on the 27th day of May A.D. 1856, they were possessed of the said parcel of

land described in said Petition, as Assignees of certain Leases before then made by the owner thereof to divers persons other than these defendants, which Leases have a long period of time yet to run; but that on or about the 15th day of September A.D. 1856, these defendants by deed bearing that date conveyed all their interest in and to said premises to one Daniel Lawrence of the City of Boston, who is still the legal owner of said Leasehold Estate, which said Deed, on or about the 16th day of October 1856 was duly recorded in the Recorders office of said County of Norfolk, as by the said deed when produced, will more fully appear.

And the said defendants further answering say that on or about the 27th day of May aforesaid they entered into a contract in writing with said petitioners, substantially the same with the specifications as set forth in said petition.

The said defendants also say that said Contract was made respecting the said lands & premises described in said petition.

And the said defendants further say that they deny that the said Complainants did all the work and furnished all the materials to be by them done and furnished, according to the provisions of said Contract. And they deny that the said petitioners were prevented by causes of delay which were unavoidable on their part from completing the said

work or the several parts thereof within the times
therein specified in such Contract, and they also deny
that the said delay in finishing said work, and
fulfilling said Contract was occasioned by the
defendants, or that they were prevented from
completing the same by the defendants neglect
to furnish any of the materials provided in and
by the said Contract or otherwise to be furnished
by them. And the said defendants allege that
the delay of the said petitioners, instead of
being occasioned by the defaults of the defend-
ants, in the premises, was in fact occasioned
by the omission of the petitioners to prosecute the
said work when the weather was suitable, and
by a bad and improper arrangement of said
work by their subletting different portions
thereof to different persons, one portion to one
man, and another portion to another man,
and thus requiring the defendants, to bring
forward the other work, which was not to
be done by the petitioners, all at the same time,
and in a manner which it was not con-
templated or agreed that they should do.
The defendants deny that the said petitioners
have been put to great expense, or any expense,
(except that which was mentioned in said petition
as amounting to Eighty six dollars and sixty
two cents, which defts. paid) or that they have
sustained any loss or damage by reason of any

default or omission of the defts to perform their part of said Contract, and that all the delays in said work, (except that above mentioned) on the part of the said petitioners, or their sub contractors, were their own fault in the arrangement of said work, and the want of proper care arrangement or diligence in prosecuting the same,

And they further say that the said petitioners did not notify the said Bigington, Wheelock or assistants at the time of any alleged delay or the damages consequent thereupon, nor did they notify the defendants to the best of their knowledge, information and belief, or either of them of the same. Except as to that above mentioned,

And the said defts deny that they delayed the said Ford, or prevented him, or any other of the subcontractors on said work, from completing their Contract,

And the said defendants further say that the said petitioners failed to complete their said contract, and that the said building was so far unfinished in respect to the said work to be done & performed by the said petitioners, and therefore unfit to be used, for the period of more than sixty days after the time appointed and fixed in said Contract for the completion thereof. And they say that the rents of said building, if finished would have amounted to

the sum of Fifteen Hundred Dollars per month, for said time, and it is provided in and by said Contract, that the said petitioners should pay the defts one hundred dollars per day for each and every day the said work remained unfinished after the time specified in said Contract, which should be deducted from the Contract price as liquidated damages, (unavoidable delays being excepted) and they further say that such delay was not unavoidable, and they shall insist on the said sum of one hundred dollars per day for said time as the damages sustained as aforesaid, and which were due and owing by petitioners at the commencement of this suit, and is still due and owing, as a legal and proper offset to the claim of the said petitioners, and which they hereby offer to allow and have deducted from any sum which the said petitioners may recover on the trial of this suit against these defendants

And the said defts further answering, admit that the said Complainants caused to be served upon them the notice mentioned in said petition whereby they objected to so much of said certificate of Wm. H. Rayington as related to the nonfulfillment of said Contract, as respects time and an allowance of two thousand dollars as damages for such nonfulfillment: - And to so much of said Certificate as related to the brick

arch side walls, substantially as stated in said petition.

41 And these defendants having fears that the persons proposed as arbitrators in said notice would have an undue partiality towards the Complainants from the fact that said persons were, as these defts were informed and believed to be true, engaged in the same occupation as that of the Complainants: and therefore would be liable to lean strongly against these defendants: did take the liberty to interpose an objection to them, and to suggest other names and persons as they believed more suitable to decide such a controversy impartially.

And with that view, these defts within the time required in said notice, sent to the Complts solicitors, the following Communication,

Chicago March 16th 1857.

Goodrich Farwell & Smith Esqrs

Gentlemen.

In pursuance of a notice from Messrs Hamblin & Goodman, of a wish on their part to arbitrate the differences which have arisen between them and us respecting the work on "Garrett Block", and, wishing ourselves to avoid litigation, and to arbitrate our differences, providing we can agree on the arbitrators, and the terms of submission, we say that we have made inquiries concerning the

42

men named by Messrs Hambleton & Goodman in their notice bearing date March 11th inst. And although they are very respectable gentlemen yet the fact that they are all engaged in the same business with Messrs Hambleton & Goodman is sufficient we think to give them an undue bias in their favor, and we therefore feel unwilling to accept either of them, and to avoid the bias which naturally arises from similarity of occupation as in the persons named we name Cyrus Beers, William R. Loomis, and James L. Howe, as arbitrators or as names to choose from, and desire that you inform us within a reasonable time whether Messrs Hambleton & Goodman, will accept them or either or them to form the arbitrators between us, which arbitrators ought not to be less than three in number, all of which ought to be chosen by the parties.

Yours Respectfully
F. Parmelee & Co.

And these defts further say that the complainants or their said Solicitors objected to all the persons so named by the defts except the said Cyrus Beers. Whom they accepted. that after considerable negotiation three arbitrators were agreed upon by the parties. but on being notified of such selection, two of them as these defendants are informed and verily

believe to be true, being the said Beers and Mr Francis Shroman refused to serve, and the defendants Parnell on being so informed and believing that it would be extremely difficult, if not impossible to obtain the services of three such gentlemen of experience, ability and integrity, as the importance of the differences between these parties required, went to the complainants Solicitor who had charge of the matter, and informed him of such conclusion, and stated that he believed it would be better for all concerned, to leave these matters to the decision of twelve men, than to try any more to have it done by arbitrators, to which the said Solicitor also assented. But nothing more was done in that behalf. And these defendants further say that according to the best of their knowledge & belief it is not true as stated in said petition that the damages resulting from the failure of said Brick arch side walk, was occasioned by a defective design of said work, but the same was the result of the negligence of the petitioners, in not building the same in the proper season of the year, and in proper and suitable weather, and in a proper manner, that they were frequently requested during the fair weather and proper season to do said work but persisted in

leaving the land, till the season became too cold and wholly unsuited to such work, and by reason thereof the work failed,

That the design of said work as they are informed and believe has been much followed and when the work is well done has always proved sufficient and successful,

And the said defendants say that they have kept and performed the said Contract on their part, except as to said short detention of a very few days, and for that they settled with and paid the complainants, but that the complainants have not performed said contract on their part, but failed so to do, and have thereby for the period of more than sixty days, without any cause of prevention by these defts, or unavoidable accidents or delays, deprived these defendants of the use of said building and occasioned damages to these defts, to a much larger sum than can or ought justly to be claimed upon said contract on their part. Without this that any other matter or thing not hereinbefore confessed or avoided traversed or denied is true to the best of their knowledge or belief. And they pray that they may be hence dismissed with their costs expended &c.

W. K. McAllister
Sol for Defts.

Franklin Pennell
Sidney Bigelow
David A. Gage

Walter S. Johnson

4 5

State of Illinois }
County of Cook } ss.

On this 7th day of May A.D. 1857. before me personally came Franklin Parmelee. one of the above named defendants and made oath that he had read the foregoing answer, and knew the contents thereof and that the same is true of his own knowledge. except the matters and things therein stated to be on the information and belief of the said defendants, and as to those matters he believes it to be true.

Calvin DWolf
Justice of the Peace

And afterwards to wit, on the First day of December in the year aforesaid, said day being one of the days of the November Special Term of said Cook County Court of Common Pleas. the following among other proceedings, was had in said Court and entered of Record. to. wit

12600-23

416

Joseph W. Hamblelton
& David Goodman

vs

Franklin Pennelee
Liberty Begilow David A.
Gage & Walter S. Johnson

} Petn Mechanics Lien

And now at this day come the said petitioners by Goodrich Farwell and Smith their Solicitors, and the defendants by W. K. McAllister their Solicitor, when, upon reading and filing of defendants affidavit on a motion for a continuance of this cause, and arguments of Counsel in support as well as in opposition to the same, the Court overrules the said motion. Whereupon the said defendants by their Solicitor excepts to such ruling by the Court.

And afterwards, to wit, on the second day of December in the year last aforesaid the said Petitioners by their said Solicitors filed in the office of the Clerk of said Court their Replications in the words and figures following, to wit

Cook County Court of Common Pleas

47

Joseph H. Hamblaton
& Daniel Goodman
as
Franklin Parmelee et al

The Replication of the above named plaintiffs to the Answer of the defendants

These Repliants saving and reserving to themselves, 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 insufficiencies of the said Answer for replication thereunto say that they will aver maintain and prove their said petition to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient, to be replied unto by these repliants, 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 & prove as this Honorable Court shall direct, and humbly pray as in and by their said Petition they have already prayed.

Goodrich Farwell & Smith Sols for plffs.

4126-20-21

And afterwards to wit. on the same day and year last aforesaid, said day being one of the days of the November Special Term of said Cook County Court of Common Pleas, the following among other proceedings was had in said Court and entered of Record to wit.

Joseph H. Hamilton
& Daniel Goodman
vs
Franklin Parmelee Liberty Bigelow. David A. Gage and Walter S Johnson

Pet Mech's Liens.

And now at this day again come the parties to this cause by their respective Solicitors, and upon issue being joined, let a Jury come, whereupon come the Jurors of a Jury of good and lawful men to wit. Isaac L. Shuey, R. S. Dick, H. W. Carter, W. P. White, H. B. Davis, S. P. Putnam, F. Coleman, Sam'l Willard, C. H. Finn Geo. Pierson G. B. Palmer and H. J. Reynolds, who being well and truly elected tried and sworn to try the issue joined as aforesaid. after hearing a part of the testimony adduced, the further hearing of this cause is postponed until to-morrow morning. to which time the Jury are permitted to deliberate by agreement.

And afterwards, to wit, on the Third day of December in the year aforesaid, said day being also one of the days of the November Special Term of said Court, the following among other proceedings, was had in said Court & entered of Record, to wit.

Joseph W. Hamilton & Daniel Goodman
vs
Franklin Pancake Liberty Bigelow, David A. Gage & Walter S. Johnson
} Peter Mucho Lien

And now at this day again come the parties to this cause by their respective Solicitors, and the Jury empanelled in this cause also come, and after hearing a part of the testimony addduced, the further hearing of this cause is continued until tomorrow morning, to which time the Jury are permitted to separate by agreement.

And afterwards, to wit, on the Fourth day of December in the year aforesaid, said day being also one of the days of the November Special Term of said Court, the following among other proceedings, was had in said Court and entered of Record, to wit.

50

Joseph W. Hambleton v
David Goodman
vs
Franklin Parmelee Liberty
Bigelow. David A. Gage
and Walter S. Johnson

} Petn. Mechs Lien

And now again at this day come the parties to this cause by their respective Solicitors for a further hearing in this cause, and the jury empannelled in this cause also come. Who after hearing the remainder of the testimony, arguments of counsel and instructions of the Court, retire to consider of their Verdict.

And afterwards, to wit, on the Fifth day of December in the year aforesaid, said day being also one of the days of the November Special Term of said Court, the following, among other proceedings was had in said Court and entered of Record, to wit

Joseph W. Hambleton v
David Goodman
vs
Franklin Parmelee Liberty
Bigelow David A. Gage
and Walter S. Johnson

} Petn Mechs. Lien

And now at this day

again Come the said petitioners by Goodrich Farwell and Smith their Solicitors. And also the said defendants by W. K. McAllister their Solicitor, and thereupon returned into Court, the Jury empannelled for the trial of this Cause and submitted their Verdict, and say We the Jury find the issues for the said petitioners, and We assess the said petitioners damages herein to the sum of Four Thousand Nine Hundred and Seventy two Dollars and Twenty Eight Cents.

And thereupon Come the said defendants by W. K. McAllister their Solicitor and enter their motion herein for a new trial in this Cause.

And afterwards to wit. on the Nineteenth day of December in the year last aforesaid. the said day being also one of the days of the November Special Term of said Court. the following among other proceedings. was had in said Court and entered of Record to wit.

Joseph H. Hambleton
v Daniel Gordinier
et
Franklin Parmelee
Liberty Bigelow David A.
Fagan Walter S. Johnson

Petn Mechs Lien.

And now at this day

5 2

again Come the said parties by their respective Solicitors, and upon a further hearing of the motion of defendants for a new trial herein and arguments of Counsel, the Court being now fully advised, overrules and denies said motion, and thereupon said defendants enter their exceptions herein to the opinion of the Court. And thereupon it is Ordered that judgment be entered on the verdict of the Jury.

It is therefore Ordered and Decreed by the Court, that the said petitioners have an mechanics lein upon the premises described in the petition in this cause. To wit. The Block of Brick Store and offices, and Building known as the Garrett Block, with the appurtenances, Erected on the leased lot or parcel of land situate in Chicago and described as follows. To wit. Bounded on the North by Randolph Street, on the West by State Street, on the South by the brick barn of Frank Parmelee & Co, and by the lot lying next south of said barn, and on the East by said barn and by an alley, being about one hundred and twenty four feet on State Street, by about one hundred and fifty one feet on Randolph Street. And also upon all the right, title and interest of the said Franklin Parmelee, Liberty Biggins, David A. Gage and Walter S. Johnson, in and to said Block of Buildings, with the ap-

53

hereditaments thereunto belonging.
And that said petitioners have and recover of the said defendants the said sum of Four Thousand Nine Hundred and Seventy two Dollars and twenty eight cents, in form aforesaid by the Jury assessed, and also their costs and charges by them about their suit in this behalf expended, and that they have a Special Execution, against the hereinbefore described premises to satisfy the same.

Whereupon come the said defendants by their Solicitor and pray an appeal to the Supreme Court of the State of Illinois, which is allowed by the Court, on their filing Appeal Bond in the sum of Eight Thousand Dollars, with Wm. R. Loomis, George W. Gage or Lyseneus Beers as security. And that thirty days time be given said defendants to file their Appeal Bond, and Bill of Exceptions herein.

And afterwards. to wit, on the Fourth day of January A.D. Eighteen Hundred and fifty Eight. the said defendants. by their said Solicitors, filed in the office of the Clerk of said Court. their Appeal Bond in the words and figures following. to wit.

55

Know all Men by these Presents, That we Franklin Parmelee, Liberty Bigelow, David A. Gage, Walter S. Johnson, William R. Loomis and Geo. W. Gage, are held and firmly bound unto Joseph W. Hamblelton & Daniel Goodman in the penal sum of Eight Thousand Dollars lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs and administrators, jointly severally and firmly by these presents. Witness our hands and seals this 4th day of January A.D. 1858.

The Condition of the above obligation is such that whereas the said Joseph W. Hamblelton and Daniel Goodman. did on the 19th day of December A.D. 1857 in the Cook County Court of Common Pleas, in and for the County of Cook and State of Illinois, recover a Judgement, against the above bounden Franklin Parmelee, Liberty Bigelow, David A. Gage, & Walter S. Johnson. for the sum of Four Thousand Nine Hundred & seventy two dollars

and twenty eight Cents besides costs, from which Judgment the said obligors last named have taken an appeal to the Supreme Court of said State,

Now if the said Franklin Pannell, Liberty Bigelow, David A. Gage and Walter S. Johnson, Appellants as aforesaid, shall duly and diligently prosecute their said appeal and shall pay the judgments, costs, interest and damages rendered, awarded and assessed against them in case the Judgment aforesaid shall be affirmed in and by said Supreme Court, then the above obligation to be void, otherwise to remain in full force & effect.

Frank. Pannell (Seal)
Liberty Bigelow (Seal)
Walter S. Johnson (Seal)
D. A. Gage (Seal)
Geo. W. Gage (Seal)
Wm R. Loomis (Seal)

And afterwards, to wit, on the Fourteenth day of January in the year last aforesaid, the said defendants, by their said Solicitors filed in the office of the Clerk of said Court, their Bill of Exceptions in the words and figures, following, to wit,

Cook County Court of Common Pleas.

57

Franklin Parmelee
Liberty Bigelow, David
A. Gage & Walter S. Johnson
vs
Joseph K. Hamilton
& Daniel Goodman

Be it remembered that on the 30th day of November A.D. 1857 that being one of the days of the November Term of the said Court, the said defendants filed with the Clerk of said Court an affidavit for a continuance of said cause, and thereupon by their Attorneys moved the said Court that the said cause be continued, which said affidavit is in the words and figures following, to wit,

Cook County Court of Common Pleas
Frank Parmelee Liberty Bigelow
David A. Gage that
vs
Joseph K. Hamilton & Daniel Goodman
} Mechanics Lien.

State of Illinois }
County of Cook } ss. Frank Parmelee one of the defendants in the above entitled

$1262.00

cause. being duly sworn deposes and says. that the said defendants. have fully and fairly stated their case in this cause. to W. K. McAllister of the City of Chicago. their counsel therein and that they have a good and substantial defence on the merits in this cause, as they are advised by their said counsel after such statements, and which the said defendants verily believe to be true.

And he further says that John Whitney. who resides in the City of Chicago. and Harmon Sanckton who is now residing in Brainbridge Granger County Ohio. are each of them necessary and material witnesses for the defendants on the trial of this cause. without whose testimony and that of each of them. the said defendants cannot fairly proceed to the trial of this cause. And deponent further says that the said witnesses are each of them mechanics. and that they are considered credible and intelligent persons. and that he expects that the defendants will be able to prove by the said John Whitney on the trial of this cause. that he the said Whitney saw the progress of the work done under the contract of the petitioners set out in their petition in this cause nearly every day. with some slight exceptions. from the commencement of the said petitioners with their said Jot until they quit

59

the same. And that from the commencement aforesaid to the time fixed in said contract for the completion of said job by the petitioners there were materials and work always in readiness for the use of petitioners in their said job sufficient to have enabled them by procuring reasonable and adequate supply of laborers and by prosecuting said work with proper diligence to have completed said job within the time fixed in said Contract for the completion thereof. And that this deponent in the month of August A.D. 1856 at the place of said work requested and urged the petitioners to procure more help, &c as to complete said job within said time, stating to them that their money was ready to pay them as fast as needed if they would do so and more particularly that deponent urged and requested them to proceed at that time, and make the brick arches under the side walks upon State & Randolph Streets, to support the flagging in front of said building on said Streets as provided by the contract, (to which contract as set forth in the said petition deponent refers as a part of this affidavit,) and he expects to be able to prove by said Whitney, that the said petitioners during the greater part of the time of doing said work, had in insuf-

5/12/1856

ficient supply of men for said work. and that they neglected to prosecute the same with diligence and fidelity, and that they wholly omitted and neglected (though requested to do the same at the proper time by deponent) to commence the building of said arches and work under the side walks until late in the fall, when the season was cold and wet, and that the same in part fell in, for that reason and for want of proper construction, soon after they were built by petitioners. And that the said job of the petitioners for and during the period of about two months after the time fixed for the completion thereof was so far unfinished as to render said building entirely untenantable during that time, and that the defendants sustained heavy damages by losing the use of said building during such time as aforesaid, and he further expects to be able to prove by said Whitney that such delay as aforesaid in completing said job was not the result of any unavoidable accident, nor of the default of the defendants in furnishing the materials required to be furnished by them or otherwise, but was the result of a want of diligence and fidelity on the part of petitioners in the prosecution of the same, and furnishing the requisite number of laborers. And he further says that

61

he expects to be able to prove by the said Sanckton on the trial of this cause, that his Witness, worked upon the said brick arches during their construction, under the direction of the petitioners. And that the weather was cold enough at the time of said work to freeze the mortar and that instead of making the mortar rich and using a small quantity of it and putting the bricks in the arches aforesaid close together, a large and improper amount of mortar was used, which on thawing necessarily gave away and displaced the bricks and thus weakened, the arches for the reason of such use of mortar and the coldness of the weather, and by the occurence of a thaw, fell in. And also that said Witness has worked at the masons trade for a great many years and has known many arches built upon the plan of those in question, and that if properly constructed, they are good and durable arches.

And defendt further says that on the Twentyfifth day of November inst. he caused the said John Whitney to be duly served with a Subpoena in this cause issued by the Clerk and under the seal of said Court requiring his appearance (among others named therein) in said Court on the 30th day of November inst the day set for the trial of said cause. to testify

on the part of the defendants.

62 And he further says that the said John Whitney since the service of said subpoena on him as aforesaid, and on the 6 o'Clock train in the morning on the 20th day of November inst. without the permission, privity or consent of the said defendants or either of them, left the City of Chicago, to go to Rochester in the State of New York, to be absent for the period of about three weeks. That the said Whitney has, and is interested in a large claim against the Detroit and Milwaukie Rail Road Company amounting as deponent is informed and believes to be true to fifteen hundred dollars. Which is past due and which said Whitney greatly feared he should lose: That during last week he received a communication from the agent of said Company. That if he said Whitney would be in Detroit on the 30th November inst. the said Claim could be settled and paid. That said Whitney also had the settlement of a rail road Contract to build portions of a road in Canada in connection with one Orson Tousley, Charles Harrington and Everhed, which required his presence at the City of Rochester New York the middle of the present week. Key appointments by his said Co-Contractor as deponent is informed and believes to be true. And that his interests in said matters would

greatly suffer unless he must there as required,
and he would unless personally present, would
probability lose said debt of $1500.

63

And deponent further says, the said Harman
Sanckton was at the time he so worked on
the said arches as aforesaid, in the employ of
and under an engagement with one B.L.
Howard, a master builder in Chicago,
and was permitted to work on said arches
under the direction of said petitioners for their
accommodation, and on account of some
neighborly dealings between said Howard and
petitioners, but was paid for the said work
by the said Howard, which facts were until
the 25th of November inst., wholly unknown
to the said defendants or either of them.

That neither of the defendants had any
acquaintance with the said Sanckton or
until the 28th inst. knew his name. That
deponent has endeavored in order to be prepared
for the trial of this cause, to ascertain the
facts concerning the same, and the names
of persons employed, by enquiring of the different
employees of the petitioners, but has been unable
from the prejudice or unwillingness of such
employees to obtain any information solicited.
And on the 25th November inst. while causing
the witnesses in this cause to be subpoenaed
he accidentally and for the first time ascertained

64

the facts aforesaid, which he could prove by the said Lanckton, and immediately applied to the said Howard for the name and residence of the said Witness: but the said Howard had forgotten his Christian name, and was unable to find out the same, and when the said Lanckton had Gone to, this using every reasonable effort by looking over papers and making inquiries until the 28th inst, when for the first time deponent ascertained the name and residence of the said Witness, and that he had left Chicago, about six weeks ago for Brainbridge aforesaid to remain there during a month or two of the Coming Winter, and then return to Chicago. Deponent further says that said Witness as he has learned since ascertaining his name is about 50 years of age, and a very candid intelligent Mason by trade, of a long and extensive experience in the different branches of his said trade in Eastern Cities, and at the time of working on the said arches as aforesaid he was not in the employment of either of the parties to this suit, and is therefor a reliable Witness, And that defendants do not Know of any Witness by whom they can so fully and satisfactorily prove the said facts as the said Whitney and the said Lanckton.

65

And deponent further says that this applica-
cation for a continuance of said cause is made
in good faith and for the mere and sole pur-
pose of securing to the defendants in this cause
on the trial thereof, their rights in the premises,
And he further says that he has no doubt but
that the defts. can obtain the testimony and
the attendance of said Witnesses for the trial
of this cause, at the next term of this Court.

Frank. Parmelee

Sworn this 30th day of
November AD. 1859 before
me. John Forsyth
Notary Public

The Counsel for the
Petitioners in opposition to such motion calles
the attention of the Court to certain statements
contained in the deposition of Patrick
Meilehan, a witness on the part of the petit-
ioners, which Deposition had been taken on
the 19th day of October AD. 1859, by the consent
of Counsel and was then on file. The follow-
ing Interrogatories had been put to the witness
viz. "Have you within the last few days had
any Conversation with the defendant Frank
Parmelee with reference to the claim of Hamilton
& Goodman, against him. If so state when
and where such Conversation took place,
and what was said by either of you on the sub-
ject?" To which he answered as follows, viz—

51 2423-93

Dr. Shaw: The conversation was last Saturday morning on the corner of State & Randolph Streets. I asked him when the trial of Mr. Hambleton was coming off. He answered that perhaps next month, but probably not until Spring. I asked him if he meant to put the trial back. He said, "If I possibly can". I think this is what he said according to the best of my opinion, I was just leaving it. To the reading of which on the hearing of said motion, the defendants by their Counsel then and there objected, which objection was overruled by the Court, and the said answer was read on the hearing of said motion. To which ruling of the Court the Defendants by their Counsel then and there excepted. And the Counsel of the petitioners also stated to the Court and the Counsel for defendants admitted John Whitney one of the persons named in the foregoing affidavit of Parmelee was the father in law of said Parmelee.

And the said Court then and there denied the said application for a continuance of said cause. And the defendants by their Counsel to said denial thereof by the Court, then and there excepted.

That on the 3d day of December A.D. 1859, said cause came on to be tried before the said Court and a jury, and thereupon the said petitioners for the purpose of

Sustaining the issues in said cause on their part, offered in evidence the Contract between the said Petitioners and the said defendants referred to in said Petition, and a copy of which is hereto attached.

And for the purpose of further sustaining the issues in said cause on their part the said Petitioners by witnesses introduced and sworn on said trial, gave evidence showing that they took possession of the ground described in said Petition and Contract and Commenced the excavations for foundation walls of the buildings to be erected thereon, by them on or about the 27th day of May A.D. 1856, and that they were engaged in and about the erection and completion of said building from that time up to and until the 20th day of February A.D. 1857. Said Petitioners offered further evidence tending to show, that they were delayed in the prosecution of their work upon said Building in the months of August September & October 1856, for want of timber Lintels, and the cast iron Window Caps and window Sills, and the Stone Sills for one of the Towers, That these materials were furnished by the defendants, but were not furnished in due and proper season as they were required, And that the defendants paid the plaintiffs the sum of $86.62 being

the wages of the men who remained idle while waiting for the Iron Caps and Sills as mentioned in the petition. That said delay occurred at different times during the months aforesaid, and that in consequence thereof the Petitioners could not employ to good advantage so many men upon said Building as they otherwise might have done, and could not proceed with the work any more rapidly than they did. Further evidence was given on the part of the petitioners tending to show that they commenced the laying of the front walls of the Building on State and Randolph Streets on the 11th day of August 1856, that for the purpose of laying the outside tier of brick, a scaffold was necessarily used, resting upon upright pals four or five feet distant from the walls, and that said front walls were finished and the scaffoldings removed, on or about the first day of November 1856. That in the month of October A.D. 1856. the petitioners at the request of the said defendants commenced the excavations under the side walks on State and Randolph Streets and were getting ready to build the brick arches for the vaults which were to be constructed beneath the side walks, and on a level with the basement Story or Cellar of the Building, and intended for the use of the

building. That the masonry of said Vaults was built up to and connected the front walls of said Building on State and Randolph Streets and extended out from said walls Sixteen or Eighteen feet. That the petitioners having built all the side walls of the Vaults and the support for the arches, commenced the construction of said arches on or about the 5th day of November 1856, and in the course of three or four days had put up all of said arches on State street and a few upon Randolph Street, and the defendants had begun to place upon the arches the flagging stone for a side walk. when the arches commenced falling in, and very soon all the arches on State Street and all but two or three on Randolph Street had given way and fallen. And at the request of the Superintendent the remaining arches were taken down and the Brick of the arches that had fallen were removed by the said petitioners, and no more arches were built, but in place of the Brick arches and flagging Stone, the defendants afterwards constructed a plank sidewalk around the building.

Petitioners further offer evidence tending to show that the Plan of the arches intended to support the side walks was defective, and that they fell because of the

defects of the plan.

Petitioners introduced further evidence tending to show that they were delayed in the completion of the plastering of said building by the cold weather and in procuring stoves for heating the rooms in which the plastering was to be done, and for want of sand cut stone work for Door Sills which were to be furnished by the defendants and without which the building could not be completely enclosed, That the roof could not be put on until the brick walls were up, and that the inside work could not be done until the roof was on, That after the roof was on the Petitioners followed up the Carpenters without delay and finished the inside work as soon as practicable.

The petitioners also introduced in evidence the certificate of the Architect Wm. H. Boyington referred to in the petition and a copy of which is therein contained, and also gave evidence showing the truth of the statements in the petition as to the interest and title of the defendants in and to the premises and showing that the defendants were in possession of the premises as described and mentioned in the petition.

The petitioners further gave evidence tending to show the amount

and value of extra work done by them in connection with said job, and mentioned by them in their said Petition in this cause.

71

The Petitioners also offered to give evidence to show that they had sustained the special damages mentioned in the petition, but the defendants Counsel objected to such evidence on the ground that if such damages were in fact sustained they could not be allowed in this proceeding - and that there could not be any lein upon the premises for such Damages, which objection was sustained by the Court, and the Petitioners were not allowed to give any evidence as to such alleged damages.

In every instance where the petitioners gave evidence to substantiate the allegations as above stated, such evidence consisted of the testimony of at least two witnesses—

The defendants, for the purpose of sustaining the issues in said Cause on their part thereupon by witnesses introduced and sworn gave testimony tending to show that the petitioners did not prosecute their work on said building diligently, particularly in the early part of the season, and that they consumed a disproportionately large part of

the Season in the construction of the foundation and partition walls. That they were not delayed to any considerable extent for want of the iron and cut stone work, and that if they had prosecuted the work diligently and vigorously after the last of the iron and cut stone was on the ground, they might have finished their portion of the work on said Building by the 1st day of December A.D. 1856. When in fact they did not finish the plastering of the building until about the 20th day of February 1857.

The defendants further offered evidence tending to show that it was not necessary to have outside scaffoldings in the putting up of the front walls, and that said walls might have been laid up from the inside and that the petitioners might have commenced their work upon the arches for the side walks much earlier in the season than they did and have finished them during the warm weather of the Summer or Autumn.

That when they commenced building said arches the weather was cold so that the mortar froze between the bricks. That the season was very unfavorable for the construction of such arches and that the petitioners had notice from the Superintendent of the Building not to build the arches at that time, and

that in going on with them at that time they assumed the responsibility of making them stand. That the arches were not properly built by the petitioners according to the plan, and that they were so informed by the Superintendent soon after they commenced building them. That the plan of the arches was a good one and suitable for the purpose intended, and if properly built so as to carry out the plan, they are strong and firm. That other arches built upon the same plan and properly constructed have stood firm for years without any indication of settling or giving way. That in warm weather is the proper time to build such arches.

The defendants further gave evidence showing that they had paid to the said Petitioners for work done and materials furnished by them on said Building the sum of Fifteen Thousand Eight Hundred and Eighty five dollars.

It further appeared from the evidence introduced by the defendants that the excavations for the brick arches, and the arches constructed in said excavations were made and constructed outside of the line of the lot, described in the petition, and in the Public Street of the City of Chicago.

7/4

The Plaintiffs Counsel thereupon asked the Court to instruct the Jury as follows.

1 The Plaintiffs are not to be charged with delay in doing their work, if such delay was caused by the defendants or was owing to the want of materials which the defendants were to furnish.

2. The Plaintiffs are not responsible for the failure of the arches, if such failure was owing to a defective design.

3. There is no issue made by the pleadings as to the Location or description of the premises upon which the work was to be done. If the Jury believe from the evidence that the work was done upon the premises mentioned in the Petition, then the Plaintiffs have a lien upon the premises if anything is due them for such work.

4 If the Jury find anything due the Plaintiffs they will allow interest at the rate of six per cent per annum from March 9th 1859.

Which said Instructions so asked for by the Counsel for the said petitioners, were given by the Court and to the giving of said Instructions and each of them separately by the Court, the Defendants by their Counsel then and there excepted.

75

The Counsel for the defendants then asked the Court to instruct the Jury on the part of said defendants as follows, to wit.

1 If the Jury find from the evidence that the brick arches in question, and the excavations in which they were placed were made within the Street or Streets of the City of Chicago, and were not in fact upon the lot or land described in the petition in this cause the Jury will as to all items claimed by the plaintiffs for that work find for the defendants.

2 That if the Jury find that the claim of the plaintiffs in this cause, includes a portion of work done and performed within the Streets of the City of Chicago, and not upon the lot or land described in the petition, which said work is done off from said lot or Land together with that which was done on said Lot or Land, was performed under one and the same Contract, and the Contract is indivisible, the claim for the whole work is not divisible, or to be apportioned, and the plaintiffs having no lien for the work done within the streets and not upon the land described, cannot by reason of the indivisibility of the Demand have a lien for any part of the same.

3 That under the contract and Specifications

76

between the parties, and read in evidence the plaintiffs are themselves bound to furnish all the stone and brick mitres caps and sills and also the cut stone to be used in doing the work on the building under said contract and specifications! And if the jury shall believe that there was any delay of said work on account of said materials or any of them not being furnished at the time they were wanted by plaintiffs on said job. which delay is no legal excuse for the plaintiff in not completing said job within the time specified in said Contract for such completion, and they will find for the defendants—

4 That the parties in this case have fixed on a certain mode by which the amount to be paid under the contract in question shall be ascertained, and having done so, the party seeking an enforcement of the agreement must show that he has done everything on his part to carry it into effect, and he cannot compel the payment of the amount claimed unless he procure the kind of evidence required by the contract or show that by time or accident he is unable to do so. And if the jury find that a certificate of the amount due has been given by the architect, the

77

plaintiffs cannot take hand of it as evidence of extra work done and reject the other part of it. but the same must be taken together in all its parts as to amounts. If one part is taken.

5 If the jury find from the evidence that the plaintiffs failed to make the brick arches in question in accordance with the Contract and specifications between the parties respecting them, or if the architect of said work gave them directions as to the manner of doing said work, and the plaintiffs failed to comply with such directions, or if they performed said work in an unskilful, unworkmanlike and unproper manner, then the plaintiffs (shape) failed to complete their said Contract and cannot recover in this suit. Whether the design for such arches was good and sufficient or not."

Of which said Instructions, the first, second, third, fourth were refused, and the last was given by the Court. And to the ruling and decision of the Court in refusing said first second third, fourth Instructions and each of them as asked for by the said defendants, as aforesaid, the defendants by their Counsel then and there excepted. And the Jury having retired to consider of their verdict

12.20.92

returned into Court. with the following Verdict. to wit.

We the Jury find a Verdict for the plaintiffs. to the amount of Four Thousand Nine Hundred and Seventy two and 28/100 Dollars.

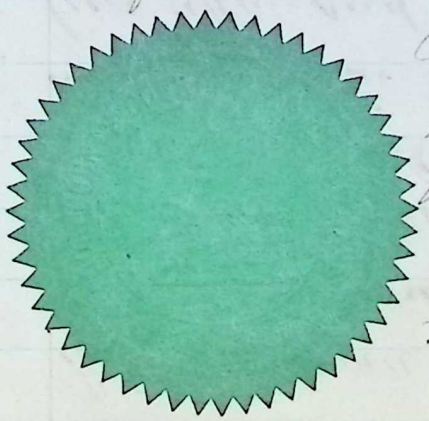
R. S. Hicks Foreman

Which said Verdict included the unpaid balance of the contract price, the amount of the extra work, and interest on the same from the 9th day of March A.D. 1857. And the said defendants by their Counsel then and there moved the Court to set aside the Verdict of the Jury, and to grant to the said defendants a new trial, which motion was overruled by the Court. To which decision of the Court in overruling said motion. the defendants by their Counsel then and there excepted, and prayed and appeal to the Supreme Court, and that this his bill of exceptions might be sealed by the Court, which is accordingly done. John M. Wilson (Seal)

77

State of Illinois }
County of Cook } ss.

I. Walter Kimball Clerk of the Cook County Court of Common Pleas, within and for said County, do hereby Certify, that the above and foregoing is a full and true transcript of the papers on file in my office, and the proceedings entered of Record in said Court in the case in which, Joseph H. Hambleton and Daniel Goodman are plaintiffs and, Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnson Defendants.



In Testimony Whereof I hereunto Subscribe my name and affix the Seal of said Court at the City of Chicago in said County this 13th day of March A.D. 1858

Walter Kimball.
Clerk

80

Supreme Court

Franklin Parmelee
Liberty Bigelow
David Agage &
Walter S Johnson
Appellants
vs
Joseph W Hambleton &
Daniel Goodman Appellees

April Term A D 1858

And now come the said Appellants by Scates McAllister Jewett & Peabody their Attorneys And say that in the Record and proceedings aforesaid and also in giving the Judgment in manner and form aforesaid there is manifest Error in this that the said Judgment declares a lien upon and authorizes a sale of the appurtenances to the premises described,

Also there is Error in overruling the Motion for a continuance, and also in permitting Evidence to be read on the hearing of said motion.

Also in giving the instructions on the part of the appellees & Refusing the instructions asked on the part of the appellants.

Also the said judgment is rendered in favor of the appellee Whereas by the Law of the Land the Same should have been given for the appellants, Wherefore the appellants pray that the Judgment aforesaid for the Errors aforesaid and for other Errors in said Record & proceedings may be reversed annulled and altogether held for naught & they be restored to all things &c by occasion of the said Judgment &c

Scates McAllister Jewett & Peabody
Attys for Appellant

and the said Defts. say there is no error in said record as above supposed.

Goodrich Parmelee
for Defts

Frank Parmelee et al

vs

Joseph H Hambleton
et al Record & Assgts

Filed April 21 1858
J Leland
Clk

$5 pd Clk

W K McAllister
for Appllts

SUPREME COURT.

FRANK PARMELEE, LIBERTY BIGELOW, DAVID A. GAGE & WALTER S. JOHNSTON, vs. JOSEPH W. HAMBLETON & DANIEL GOODMAN.	Appeal from the Cook County Court of Common Pleas. MECHANICS' LIEN. Abstract of Record.

This suit was commenced by filing a petition, to April term, A. D. 1857, of the Cook county Circuit Court, for the enforcement of a Mechanics Lien, under the statute. At the June special term of the Circuit Court, the said cause was transferred to the Cook county Court of Common Pleas. And the petition, answer and other papers in the case duly filed in said Court of Common Pleas. The said petition is as follows:

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

To the Honorable George Manierre, Judge of the Circuit Court of Cook Co.:

The petition of Joseph W. Hambleton and Daniel Goodman respectfully shows unto your honor, that your petitioners are masons by trade and are partners doing business in the city of Chicago, in said county under the name of Hambleton and Goodman.

That Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnson, on and before the 27th day of May 1856, possessed and occupied a certain parcel of land situate in Chicago aforesaid, and described as follows, to wit: Bounded on the North by Randolph street, on the West by State street, on the

South by the brick barn of Frank Parmelee & Co., and by the lot lying next south of said barn, and on the east by said barn and by an alley, being about one hundred and twenty-four feet on State street, by about one hundred ond fifty-one feet on Randolph street. Which lands were and are held by them under and by virtue of certain leases before them made by the owners of the above described premises for a long term of years. Which term will not expire for a number of years yet to come. That on or about the said 27th day of May, the said Parmelee, Bigelow, Gage and Johnson by their company name of "Frank Parmelee & Co." made and entered into a contract in writing with your petitioners of which contract the following is a copy, viz..

These articles of agreement made and entered into this 27th day of May, A. D., 1856, between Hambleton and Goodman of the first part, building contractors of the city of Chicago, and Frank Parmelee & Co., of the same place of the second part witnesseth,

That the said Hambleton & Goodman or executor's administrators and assigns, for and in consideration of the payments hereinafter to be made to them by the said F. Parmelee & Co., or their legal representatives, do on their part contract and agree to build finish and complete in a careful, skillful and workmanlike manner, to the full and complete satisfaction of Wm. W. Boyington or assistant superintendent, and by and at the times mentioned in the foregoing specifications, the masons and stonework of a five story block and basement of stores and offices, that is to be erected on the corner of Randolph and State, as aforesaid, so as fully to carry out the designs of said work as it is set forth in the foregoing specifications and the plans and drawings therein especially refered to. Said specifications and plans and drawings, being hereby declared part and parcel of this contract.

And the said Frank Parmelee & Co., or their executors administrators or assigns, for and in consideration of the said Hambleton & Goodman doth fully and faithfully executing the aforesaid work, so as to fully carry out the design for the same, as set forth by the specifications. And accordingly to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of Wm. W.

8

Boyington, or his assistant superintendent as aforesaid, and at the times mentioned in the foregoing specifications doth hereby agree to pay the said the sum of Twenty Thousand Three Hundred and seventy-four dollars $20,374 in the manner following viz.: As the work progresses, the superintendent is to make out estimates from time to time, of the work and material in-wrought into the building and upon presentation of a certificate from said superintendent of eighty-five per cent on said estimate. The said Frank Parmelee & Co., or their legal representatives are to pay the amount from time to time, and the balance fifteen per cent is to be paid together with any other balance that may be due to said Hambleton & Goodman, upon the completion of the contract as aforesaid, provided the said superintendent shall certify in writing that they are entitled thereto.

In Witness whereof, the parties hereto have set their hands the day and year above written. (Signed)

HAMBLETON & GOODMAN.
FRANK PARMELEE & Co.

9

That specifications mentioned in the said contract is hereto annexed and marked schedule A, and is made a part of this petition, excepting, however, that the words in said specifications contained under the head of "damages" and relating to unavoidable delays, were added some few days after the said 27th day of May, with the consent and by the directions of the parties to such contracts and for the purpose of making such addition a part of such contract.

And your petitioners further show that the premises first above described, and which are hereinbefore stated to have been possessed and occupied by the said Parmelee, Bigelow, Gage and Johnson are the same premises referred to, in the said contract and specifications and are the same lands and premises upon which your petitioners performed the work, furnished the materials and put up the buildings as hereinafter stated.

And your petitioners further show that immediately after making such contract

$12120.47

10

they proceeded to the performance of the same, on their part, and did all the work and furnished all the materials to be by them done and furnished according to the provisions of such contract, and would have completed the work and the several parts thereof within the times specified in such contract if they had not been prevented by causes of delay that were unavoidable on their part, and if they had not been delayed said Frank Parmelee & Co. And if they had not been obliged to wait for certain iron work and castings which were to be furnished and which were finally furnished by the same Frank Parmelee & Co. That your petitioners were obliged to wait for lintels to be placed over the iron columns, and for the iron window caps and sills, and for the stone sills of the south tower, and for the carpenter work to be done, and for the building to be shut up and warmed so that the plastering would dry.

10

11

Your petitioners further show unto your honor, that by reason of the neglect of the said Frank Parmelee & Co., in the particulars above mentioned and by reason of the said delay consequent thereupon your petitioners were put to great expense and suffered great loss and damage, inasmuch as they could not keep their men at work to advantage, and the men were frequently idle for want of work, and your petitioners were obliged from time to time to discharge their men and then to hire again at higher wages, and were obliged to complete the job when the days were short, and during the cold weather of the fall and winter, when it necessarily cost them a much larger sum, than it would if they could have done such work at the time contemplated when such contract was made. Which loss and damage so sustained by your petitioners to the sum of Ten Thousand Dollars, besides the sum $86,62, a claim for money paid as hereinafter mentioned. That your petitioners frequently complained to the said Frank Parmelee & Co., and to their architect and agent, the said Boyington of each delay and notified them of the damage which your petitioners were sustaining in consequence thereof.

11

Your petitioners further show unto your honor that at the request of the said Frank Parmelee & Co. and under the direction of the said superintendent they furnished materials and performed work in addition to that which was specified in the contract, of the value of Five Hundred Dollars or thereabouts.

12

Your petitioners further show that they made an agreement with one William

[12630-45]

12

Ford by the terms of which agreement he was to lay up the front wall of the building, and he employed a sufficient number of competent workmen and would have completed his job in the month of August if he had not been delayed through the default of the said Frank Parmelee & Co., in the particulars above mentioned, That his men were frequently without work, and he was on several occasions obliged to dismiss a number of them while waiting for said iron work. That finally the said Frank Parmelee & Co. either personally or by their said architect requested that the said Ford should retain his workmen and promised to pay their wages for such time as they should thereafter remain idle for want of iron work so to be furnished by the said Frank Parmelee & Co. That pursuant to such request, the masons and laborers were detained and paid by said Ford, and your petitioners for time that they were idle from the 22nd to the 26th of September the sum af eighty six dollars and sixty two cents.

13

And your petitioners further show unto your honor, that your petitioners having ta length fully comp'eted their job, and having faithfully kept and performed the said contract, on their part, did, on or about the 1st day of March last past, present to the architect and superintendent, the said Wm. W. Boyington, their account and claim for the extra work and materials, which they had so done and furnished, as above mentioned, which account also included the items of the said claim of $86 12-100, being for money paid at the request of said Frank Parmelee & Co., as above stated. That your petitioners and the said Boyington looked over such account, and made divers corrections in the same, and mutually agreed that the amount due thereon unto your petitioners, for such extra work and materials, was the sum of $497, and that the said sum of $86 12-100, was also justly due to your petitioners. That thereupon your petitioners applied to the said Boyington to give them a final certificate for the balance due them, of the price mentioned in said contract, and also for the amount due for such extra work and materials, for said money paid.

13-14

And your petitioners further show that on the 9th day of March last past the said Boyington delivered unto your petitioners a certificate of which the following is a copy, viz.:

Chicago, March 9th, 1857.

I hereby certify that I have carefully examined all the variations from the

$1262.47

14

contract by which Messrs. Hambleton & Goodman, on the 27th day of May, A. D. 1851, agreed to the masonry and stone work, and furnish materials for a block of stores and offices situated on the corner of State and Randolph streets for Messrs. F. Parmelee & Co. I find that Messrs. Hambleton & Goodman are entitled to an allowance of four hundred and ninety-seven dollars

for various extra work &c.		$497,00
Amount of contract,		$20,374,00
		$20,871,00
Messrs. Hambleton & Goodman are also deficient in point of not fulfilling contract and work charged, making some parts less than was called for in the contract, viz.:		
For brick work and plastering omitted,		$1,874
" brick arch side walks,		$500,00
" twenty days delay in finishing the building as provided in contract	$200,000	2,568 74
		$18,302,26
Payments as per certificate from time to time,		$15,885,00
		$2,417,35

WM. W. BOYINGTON,
Superintendent.

15

Your petitioners further show that they at once appealed from the decision of the said Boyington, as will appear from the following notice which they served upon the said Frank Parmelee & Co., and upon the said Boyington on the 12th day of March.

GENTLEMEN,

Having fully performed on our part the contract entered into on the 27th day of March, 1856, with Frank Parmelee & Co., we applied to Wm. W. Boyington the superintendent, for a final certificate for the balance due us. On the 9th day of March instant, he delivered to us a certificate in which he among other things professes to decide and certify that we are deficient in point of not fulfilling contract and work charged. Making some parts less than was called for in the contract, to wit,

For brick arch side walks, ... $500,00

Twenty day's delay in finishing the building as provided in contract, ... $2000,00
Thereby leaving the balance due us only, ... $2,417,27

15

We claim that whatever damage or loss may have been sustained in relation to the brick arch side walks, resulted from a defective design furnished by said superintendent and that whatever delay there was in finishing the building was unavoidable on our part and was caused by you or by some of you.

16

You will please take notice that we hereby protest, against the above mentioned decision of the said superintendent, and as provided for in said contract appeal from such decision to an arbitration to be chosen indifferently. And we propose as arbitrators the following named persons, to wit, Thomas Wilner, Levi H. Waterhouse and William H. Carter, each of whom is, as we believe disinterested, and fully competent to act as such arbitrator. If you are willing to submit to such arbitration please notify us or our attorneys, hereinafter named, of such willingness without delay, so that we may if possible agree with you upon the persons to act as arbitrators. Our attorneys above referred to are Messrs. Goodrich, Farwell and Smith, whose office is 47 Clark street. If you do not on or before the 16th instant, notify us or our attorneys of your willingness to submit to such arbitration. We shall conclude that you refuse to arbitrate, and we shall be compelled to commence suit to enforce our claim against said Frank Parmelee & Co.

Dated March 11th, 1857.

Very respectfully yours,

HAMBLETON & GOODMAN.

To Messrs. Frank Parmelee & Co., Mr. Wm. W. Boyington.

17

Your petitioners further show that after such certificate was given by said Boyington as aforesaid, they called on him and inquired of him why he had neglected to include in said certificate the said sum of $86,62, and he admitted that it was omitted by mistake, and then gave them a separate certificate for that amount, which amount the said Frank Parmelee & Co. afterwards paid to your petitioners.

Your petitioners further show that it is *true* as was in said notice stated, that

17

whatever damage or loss was sustained in relation to the "brick arch side walks" resulttd from a defective design furnished by said Boyington and that the work done by your petitioners was done well and in strict compliance with the contract, and according to the designs furnished, that the said brick and side walks were nearly completed, when they gave way, and it was evident that arches built according to such design would not be sufficient, and your petitioners were directed not to complete them but were told that they must remove the materials provided and used for such arches, which instructions by said Boyington your petitioners followed.

18

Your petitioners further show that although the said Frank Parmelee & Co., after receiving such notice at first consented to such arbitration, and agreed with your petitioners upon persons to act as arbitrators, yet the said Frank Parmelee & Co. finally concluded not to submit to such arbitration. That on the 25th day of March the said Parmelee called at the office of the said attorneys and informed them that the persons whom they had named were not willing to act, that they (the said Frank Parmelee & Co. meaning,) had not been able to find suitable men who would act as arbitrators in the matter, that they had concluded not to try any farther, and that they had rather leave the matter to the decision of twelve men, than to any three men they would be able to get. Your petitioners therefore claim that the said Frank Parmelee & Co., are justly indebted to your petitioners as following, viz.

19

The balance of the price mentioned in the contract after deducting all payments and also deducting the said sum of $18,74 for brick work and plastering omitted and also allowing for the materials taken from the brick arch side walks, and for the value of the work remaining to be done on the said side-walks, when your petitioners were instructed not to complete them	$150	$4,260,26
For extra work and materials,		497,00
For damages sustained through the default of said Frank Parmelee & Co. above set forth,		2000,00
Total		$6,757,26

Your petitioners further show that as they are advised and verily believe they have a lien upon the said land and upon the leasehold interest of the said Frank Parmelee & Co. in and to said land, and upon the said building for the sum so due them as aforesaid. And they ask the aid of this honorable court in the premises, and pray that such lien may be enforced, and that a judgment or decree may be made direct-

19

ing the sale of said leasehold interest and of said buildings, and of all the right, title, and interest of the said Parmelee, Bigelow, Gage and Johnson, in or to the said land or buildings, to pay the sum due to your petitioners as aforesaid, and that such other further, or different order or decree may be made in the premises as to your honor shall seem meet, and as shall be agreeable to equity.

20

Your petitioners further pray that a summons may issue from this court directed to the sheriff of Cook county, to summon the said Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnson, returnable to the next term of this court to cause them to appear and answer this petition.

DANIEL GOODMAN,
JOSEPH W. HAMBLETON.

GOODRICH, FARWELL & SMITH, *Soliciters for Petitioners.*

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

The above named Joseph W. Hambleton and Daniel Goodman being severally duly affirmed, each for himself doth say that he has heard read the foregoing petition and knows the contents thereof, and the same is true according to the best of his knowledge and belief.

JOSEPH W. HAMBLETON.
DANIEL GOODMAN.

This 2nd day of April, 1857,
Wm. L. Church clerk.

"SCHEDULE A."

21
Construction

SPECIFICATIONS FOR THE MASONS: Work and materials required for the erection and completion of a block of pressed brick stores and offices that F. Parmelee & Co. are about to have built on the corner of State and Randolph streets, in front of and in connection with the walls of the omnibus barn.

Special reference will be had by the contractor to the following specifications, and

1260-59

21 the accompanying designs, as made by Wm. W. Boyington, architect, and which consists of the following drawings, to wit:

Plan of Foundation, and Vaults under walk.
" " Basement.
" " Main Floor.
" " Second "
" " Third and Fourth Floors will be the same as the second floor. Fifth Floors will be only finished in towers.

DUTIES OF CONTRACTOR: He shall be strictly held to make such work, and to use such material as is hereinafter described, and to work up the building to the given design, and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions, without reference to what the drawing may measure on its scale. He will be further held to submit as to the character of the materials used 22 and the work done, to the judgment of the superintendent, and to procure from him all necessary interpretations of the design, and all necessary certificates, regarding his payments.

SUPERINTENDANTS AND THEIR DUTIES: Boyington & Wheelock, or assistant architects, are declared to be the superintendents of the work for the owner. Their duties will consist in giving, on demand, such interpretations, either in language, writing or drawing, as in their judgments the nature of the work may require, having particular care that any and all work done, and materials used for the work, be such as is hereinafter described, in giving, on demand, any certificates that the contractor may be entitled to, and in settling all deductions of, or additions to the contract price which may grow out of alterations of the design, after the same is declared to the contract. Also determining the amount of damages which may accrue from any cause, and to particularly decide upon the fitness of all material used, and work done

The contractor being bound in all cases, to remove all improper work or materials, upon being directed so to do by the superintendent.

But the contractor, if, after being directed, as above, to remove the same, should

[12426-51]

23

refuse or neglect so to do, shall not only suffer a deduction from the contract price of the difference, in value of proper and improper work and materials, but shall also be liable for all damages of whatsoever nature or kind, that may result from such cause. The above provisions to apply in the same way to all materials or work used, made or fixed, without the knowledge of the superintendent.

And it is hereby expressly provided, that, in case, the contractor should feel aggrieved by the decision of the superindentent, an appeal may be taken from such decision to an arbitration, chosen indifferently, and whose decision in the matter shall be final, and binding on all parties.

The owner reserves the right to alter or modify the design, and to add to or diminish from the contract price, the difference to be adjusted, as provided above.

24—

The owner being bound, in all cases, to recognize the *acts* of his superintendent, not only as regards *extra work*, but also to the sufficiency of the design, the contractor being in no case responsible for any accident resulting to the work from a defective design, which fact must be determined by an arbitration of three disinterested men, chosen indifferently, and if found that the damages resulted from a want of proper care on the part of contractor, then, and in such case, the damages and loss shall be paid for and made good by him. But, if found that the accident or damage resulted from an improper design, then, and in such case, all damages shall be sustained by owners; which, in all cases, must be real, and in no case constructive damages to be allowed.

All payments made on the work during its progress are on account of the contract, and shall, in no case, be construed as an acceptance of the work executed, but the contractor shall be liable to all the conditions of the contract, until the work is accepted, as finished and completed.

[12120-53]

24

Dimensions of the building, as represented by, and figured on the drawings:

Heights.

Basement Story, 8' (Cellar,)	walk under, to be	6' 6" feet.
Principal	do	do 13' 3" do.
Second	do	do 12' 3" do.
Third	do	do 11' 3" do.
Fourth	do	do 10' 3" do.
Fifth	do	do 15' 0" do.

25

For depth of foundation below the cellar bottoms, see sections and plans.

This building is intended to be thorough in every particular, and must be finished throughout, as hereinafter described, and anything shown by the drawings, and not hereinafter particularly reserved or described, which is necessary to complete the masons materials and work of the building is to be done at the cost of the contractor notwithstanding such omission.

GRADE OF BUILDING.

Top of first floor of joist to be fixed twenty-one inches above the new grade of sidewalk.

EXCAVATIONS.

The entire area of the proposed building, as required by plans, to be dug out to the required depth for cellar and basement bottom, by propr etors. Excavations for footings of walls, to be dug by contractor, below the first named excavation. All other excavations for drains and cisterns, and for foundations of piers, and for vault of water closets, as required by plans, to be dug by the contractor. All the excavated earth to be disposed of by the proprietors. Contractor to properly level off the earth about the walls, so as to turn the water from the walls, and re-fill the excavations for drains. After the same is put in and properly fixed, the drains will all be let into the sewer that now passes from the barn to State street. These drain pipes will be furnished, and laid by the proprietors, after the trenches are dug, and cesspools properly arranged by the person putting in the drain pipes, so as to drain each basement and cellar under the walks seperate.

26

26.

RUBBLE STONE WORK.

All walls shaded blue to be of stone, of dimensions, and heights figured on the drawings and composed of good quarry stone, laid in the best manner with mortar mixed of proper proportions of best lime and clean coarse sand, the whole to be well bedded and bonded together and well faced on both sides.

Dwarf walls to have stone foundations, same kind of work as above specified between main pier, same depth and average twenty-four inches thick laid in cement mortar, all stone walls to be laid in cement mortar one foot above the basement floor, outside walls to cellars under the side-walks will be laid in cement full height

27—

Footing of wall for piers on fronts from the bottom of trenches to be composed of large stone, and will be three feet high and five feet 6" wide the first course or layer must not be less than twelve inches thick by thirty feet square surface and must be well settled in the earth by a heavy instrument of wood and laid in a mortar made of two parts sand and one of water lime, upon the first stone there will be two more courses 10" to 12" each 4' x 4' and 3' x 3' thoroughly fitted together and bedded in fine mortar as above, the top of the top stone will be dressed with square edges. Piers in the cellar for partition walls 3 feet deep built of good square stones, and the top of each to be covered with a stone at least 10" thick. Bearing walls for the support of the arches and side-walks will be as shown in plans and sections. Foundations for the support of the iron columns in the cellars under walks will be composed of large stone, one stone to each layer and well fitted together.

The top of the piers for the fronts to rest the iron columns upon will be dressed and squared for staying surface.

The same kind of stone will be used for the foundations of iron columns for the interior of basement and laid in same way. All necessary holes to receive timbers and joists must be cut in the brick and stone work of old walls, by contractor for masonry. Walls of areas to be of stone, for height and thickness, see section and plan. The face of which must be laid in courses with good bonds and coarse, bush

27

hammer face. All door and window openings left where shown on plans with return stone jambs and stone caps and sills.

All proper holes left for drains and gas pipes as directed or shown by plans.

28

CUT STONE.

For the quality and kind reference will be had to the accompanying description and drawings, where the same is plainly described and shown, and must all be properly set, and after the walls are finished to be properly cleaned off and pointed up.

29

All stone piers shown on basement plan must be composed of good square blocks, well cut on all sides, medium bush-hammered with 1½ inch border, well laid in fine mortar to the right height to rest the columns upon, there will be no stone door sills. There will be a belting course of cut stone 6 inches thick laid in connection with the stone sills to the first tier of windows above the stores with a drip cut on under side, this belt course will project 2½ inches and lay in the wall at least 6 inches, and at the windows full width for sills of 8 inch jambs, under this belt of stone will be a strip of sheet lead 8" wide laid in the wall solid and furnished by the mason, projecting out for the purpose of making water tight over cornice and balcony. The stone piers dividing the store fronts on both streets will be formed in blocks thirteen inches deep into them with rustic joint, fine bush hammered face with fine miter border, all neatly trimmed and laid up with a fine point of mortar, up to the right height for the lintel of store fronts.

BRICK WORK.

All walls shaded red on the plans are to be of bricks of the thickness and size marked on the plans, laid in the best manner, with solid heads and bed joints, and slushed solid every two courses. The cellars under the walks will be formed with 12 inch cross skin back brick arches, from which four inch brick arches will be turned and all laid in cement mortar composed of two parts sand to one of cement. The cross arches will be anchored with 1 inch round iron with nuts and washers at each

[12120-55]

29

end. The washer on the area side will be four feet long, let into the face of the wall, size $1\frac{1}{2}$ x $2\frac{1}{2}$ with $\frac{3}{4}$ bolt at bottom through the wall.

The window jambs and casings outside for the last story of towers will be formed of brick and will be on all sides except the south side of south tower. There will be three of these towers one to each corner of the building.

30

All brick used for facing the outside walls must be hard burned, all *soft brick* to be rejected from the work. The face will be red, pressed brick, on both streets, close jointed and tuck pointed. Tower walls to extend above the roof of main building on all sides, the inner sides to each will be commenced on trusses from the ceiling of fourth story, these tower walls will be light in thick above the fourth story. Owners will furnish at the time they are wanted in all cases where the roof is to be of felt and composition, a sufficient amount of 2 x 4 inch scantling to surround the whole roof of building and which must be built in the fire walls by contractor in such a manner as the lower side of the piece will be flush with the top of the roof boards. All chimneys to be built as shown by drawings, and in all cases where the flues passes through the floorings the brick work must project out 4 inches so as to form at least 8 inches between the timbers and smoke flues, all the flues to be smoothly plastered on the inside, and have stove pipe thimbles with tin stoppers, as directed, and be finished above the roof, at least one foot above the highest point. There will be brick arch window caps to all the windows of the fourth story. Seasoned lath to be worked in all the joints of the brick of the outside walls of the different stories, one to each 12th course. Contractor to execute all the masonry and furnish all the materials necessary for setting bank vault in the corner room, and all necessary iron anchors and stone lining for same. Iron grating for ventilation 8 x 12 inches, to be worked in the outside walls with connecting flues to reach the basement under walks. The contractor for the masonry will set all stone and iron window caps and sills in a thorough manner.

31

IRON ANCHORS,

For each of the piers, and for at least every ten feet of the dead walls, to be

31

carefully worked in the masonry and secured to the timbers of each of the floors and roof. There will be 1½ by 2½ wrought iron anchors, extending on top of stone piers and let into the same on both fronts, and will extend the whole length of both fronts over openings except where oak timbers are to be put in.

The iron anchors for the fronts will be turned down into the stone one inch, and pass each other at least 6 inches, so as to prevent splitting the stone. Iron to be let in flush with top of stone.

32

These will be all pin anchors, made to wit: Pin eight inches long, of 7-8 round iron, the shank to be 24 inches long, properly welded around the pin, and will be fastened to the timber with two spikes, size of iron ½ x 1½. Those for the stone lintels of fronts to be extra heavy and must be long enough to reach the third joist from the stone or timber to be anchored. Straps of ½x1½ iron to be placed on the timbers of all the floors and roof, where the same lie upon and meet on divissior walls, these straps must be 20 inches long, American iron, and have 4 spikes each, with ends turned down into timbers. All main timbers that connect with the old wall, or every ten feet of joist must have the same kind of anchor extending through the wall, with a nut on inside of wall.

PLASTERING

All throughout the building to be of the best quality plaster of Paris finish.—All three coat work except the basement, fourth and fifth stories, which will be two coats.

All brown mortar must be composed of suitable proportions of clear, sharp sand, quick fresh lime and hair, each of which must be put on at proper proportions and times. The finishing coat must be thoroughly polished, with plumb angles and true corners.

The contractor for the masonry will be held responsible for a perfect job of plas-

[illegible]

32

tering, and all places that may have been damaged or bruised by carpenters or otherwise must be made good by the mason, without extra charge.

Contracts of Cont 33

Finally the whole job to be fully completed in a careful, skilful and workmanlike manner, and every material to be furnished therefor, and anything shown by the plans relating to or is necessary to complete the masonry of the building, and not hereinbefore particularly reserved or described, is to be done at the cost of the contractor, notwithstanding such omission.

FINAL.

Construction

Owner to give possession of the ground on or before the 20th day of May A. D. 1856. Contractor must agree to build the walls and chimneys ready for roof on or before Sept. 1st 1856, and fully complete the plastering of the building within forty-five days after the same is declared by the Superintendent ready for lathing, and must complete the whole job of masonry within one hundred and fifty days after the first aboved mentioned time.

Said work in no case shall be considered as finished, unless the same is so reported to the Superintendent and accepted by him. The owner hereby agreeing to have in readiness all necessary timber and carpenter's work as they may be wanted, so that in no case the masonry shall be hindered for the want of the same, and will put on each floor of joist on all the buildings within days after the walls are made ready to receive the same and in case he should fail to do so, then and in such case do hereby agree to extend the time for finishing said work in a Pro Rata proportion for such delay, and will also pay all damages resulting to the contractor from such cause of delay, provided the contractor shall at the time of such delay notify the superintendent in writing of the extent thereof, and the damages to him arising therefrom, and if required by owner must prove the same.

34

DAMAGES.

And in order to secure the execution of the work in the manner, and at the times specified, it is hereby distinctly declared that the damages arising from the non-ful-

[1856-58]

34

fillment of the contract as regards time, shall be one hundred dotlars per day, for each and every day the work remains unfinished and which sum of damages shall be deducted from the contract price as eliquidated damages. The object of the above is to guard against delays that can be avoided but unavoidable delays excepted.

PAYMENTS.

To be made on the work as may be hereafter agreed.

35

The Answer of the defendants is as follows.

The answer of Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnston, defendants to the petition of Joseph W. Hambleton and Daniel Goodman, petitioners in the said petition against the defendants aforesaid:

37

And the said defendants answering said petition say that they admit that on the 27th day of May A. D. 1856, they were possessed of said parcel of land described in said petition, as assignees of certain leases before then made by the owners thereof, to divers persons other than these defendents, which leases have a long period of time yet to run; but that on or about the 15th day of September A. D. 1856 these defendants, by their deed bearing that date conveyed all their interest in and to said premises to one Daniel Lawrence of the city of Boston, who is still the legal owner of said leasehold estate, which said deed on about the 16th day of October 1856, was duly recorded in the Recorder's office of said county of Cook, as by the said deed when produced will more fully appear.

And the said defendants further answering say that on or about the 27th day of May aforesaid, they entered into a contract with the said petitioners substantially the same with the specifications as set forth in said petition.

[12120-59]

37

The said defendants also say that said] contract was made respecting the said lands and premises described in said petition.

38

And the said defendants further say that they deny that the said complainants did all the work and furnished all the materials to be by them done and furnished according to the provisions of said contract and they deny that the said petitioners were prevented by causes of delay which were unavoidable on their part from completing the said work or the several parts thereof within the time specified in such contract, and they also deny that the said delay in finishing said work and fulfilling said contract was occasioned by the defendants, or that they were prevented from completing the same by the defendants neglect to furnish any of the materials provided in and by the said contract or otherwise to be furnished by them. And the said defendants allege that the delay of the said petitioners, instead or being occasioned by the default of the defendants in the premises, was in fact occasioned by the omission of the petitioners to prosecute the said work when the weather was suitable and by a bad and improper arrangement of said work, by their sub-letting different portions thereof, to different persons one portion to one man and another portion to another man, and thus requiring the defendants to bring forward the other work, which was not to be done by the petitioners, all at the same time and in a manner which it was not contemplated or agreed that they should do.

39

The defendants deny that the said petitioners have been put to great expense, or any expense (except that which was mentioned in said petition as amounting to eighty-six dollars and sixty-two-cents, which defendants paid or that they have sustained any loss or damage by reason of any default or omission of the defendants to perform their part of said contract and that all the delays in said work, (except that above mentioned) on the part of said petitioners or their sub-contractors, were their own fault in the arrangement of said work and the want of proper care, arrangement and diligence in prosecuting the same.

And they further say that the said petitioners did not notify the said Boyington, Wheelock or assistant, at the time of any alledged delay or the damages consequent thereupon, nor did they notify the defendants to the best of their knowledge, infor-

39

mation and belief, or either of them, of the same, except as to that above mentioned. And the said defendants deny that they delayed the said Ford or prevented him, or any other of the sub-contractors on said work from completing their contract.

And the said defendants further say that the said petitioners failed to complete their said contract, and that the said building was so far unfinished in respect to the said work to be done and performed by the said petioners and therefore unfit to be used for the period of more than sixty days after the time appointed and fixed in said contract for the completion thereof, and they say that the rents of said building if finished would have amounted to the sum of fifteen hundred dollars per month for said time, and it is provided in and by said contract and that the said petitioners should pay the defendants one hundred dollars per day for each and every day the said work remained unfinished after the time specified in said contract, which should be deducted from the contract price as liquidated damages(unavoidable delays being excepted) and they further say that such delay was not unavoidable, and they shall insist on the said sum of one hundred dollars per day for said time, as the damages sustained as aforesaid, and which was due and owing by petitioners at the commencement of this suit and it is still due and owing as a legal proper offset to the claim of the said petitioners and which they hereby offer to allow and have deducted from any sum which the said petitioners may prove on the trial, of this suit against these defendants. And the said defendants further answering admit that the said complainant caused to be served upon them the notice mentioned in said petition whereby they objected to so much of said certificate of Wm. W. Boyington as related to the non-fulfilment of said contract as respects time, and an allowance of two thousand dollars as damages for such non-fulfillment, and to so much of said certificate as related to the brick and side walk substantially as stated in said petition,

40

41

And these defendants having fears that the persons proposed as arbitrators in said notice would have an undue partiality towards the complainants, from the fact that said persons were, as these defendants were informed and believed to be true engaged in the same occupation as that of the complainants, and therefore would be liable to lean strongly against these defendants, did take the liberty to interpose an objection to them, and to suggest other names and persons as they believed more suitable to decide such a controversy impartially.

[12200-41]

41

And with that view these defendants within the time required in said notice, sent to complainants' solicitors the following communication.

Chicago, March 16th, 1857.

GOODRICH, FARWELL AND SMITH, Esq'rs.

GENTLEMEN:

In pursuance of a notice from Hambleton & Goodman, of a wish on their part to arbitrate the differences which have arisen between them and us, respecting the work on "Garret Block," and wishing ourselves to avoid litigation, and to arbitrate our differences, providing we can agree on the arbitrators, and the terms of submission, we say that we have made inquiries concerning the men named by Messrs. Hambleton & Goodman in their notice bearing date March 11th inst, and although they are very reputable gentlemen, yet the fact that they are all engaged in the same business with Messrs. Hambleton & Goodman is sufficient, we think, to give them an undue bias in their favor and we therefore feel unwilling to accept either of them, and to avoid the bias which naturally arises from similarity of occupation as in the persons named, we name Cyrus Beers, William R. Loomis and James L. Howe, as arbitrators, or as names to choose from, and desire that you inform us within a reasonable time whether Messrs. Hambleton & Goodman will accept these or either of them, to form the arbitrators between us, which arbitrators ought not to be less than three in number, all of which ought to be chosen by the parties.

42

Yours Respectfully,

F. PARMELEE & CO.

And these Defendants further say that the complainants or their said solicitors objected to all the persons so named by the said deff'ts, except the said Cyrus Beers, whom they accepted, that after considerable negotiation these arbitrators were agreed upon by the parties but on being notified of such selection, two of them as these defendants are informed, and verily believe to be true, being the said Beers and Mr. Francis Sherman refused to serve and the defendant Parmelee on being so informed and believing that it would be extremely difficult if not impossible to obtain the services of three such gentlemen of experience, ability and integrity, as the importance of the differences between the parties required, went to the complain-

43

[12620-63]

43

ant's solicitor who had charge of the matter, and informed him of such conclusion, and stated that he believed it would be better for all concerned to leave these matters to the decision of twelve men than to try any more to have it done by arbitrators, to which the said solicitors also assented. But nothing more was done in that behalf.

And these defendants further say, that according to the best of their knowledge and belief, it is not true, as stated in said petition; that the damage resulting from the failure of said brick arch side walks, was occasioned by a defective design of said work, but the same was the result of the negligence of the petitioners in not building the same in the proper season of the year, and in proper and suitable weather, and in a proper manner; that they were frequently requested during the fair weather, and proper season to do said work, but persisted in leaving the same till the season became wet and cold, and wholly unsuited to such work, and by reasson theeof the work failed. That the design of said work, as they are informed and believe, has been much followed' and when the work is well done, has alwas proved sufficient and successful.

44

And the said defendants say that they kept and performed the said contract on their part, except as to said short detention of a very few days and for that they settled with and paid the complainants, but that the complainants have not performed said contract on their part but failed so to do and have thereby for the period of more than sixty days without any cause of prevention by these defendants or unavoidable accidents or delays, deprived these defendants of the use of said building and occasional damages to these defendants to a much larger sum than can or ought justly to be claimed upon said contract on their part. Without this that any other matter or thing not hereinbefore confessed or avoided, traversed or denied, is true to the best of their knowledge or belief, and they pray that they may be hence dismissed with their costs, expenses &c.

FRANKLIN PARMELEE,
LIBERTY BIGELOW,
DAVID A. GAGE,
WALTER S. JOHNSON.

WM. K. McALLISTER *Solicitors for Defendants.*

Replication was filled in the usual form.

{12620-63}

57.

The bill of exceptions was entitled in the cause in said Court of Common Pleas and is as follows, viz.:

Be it remembered that on the 30th day of November, A. D., 1857, that being one of the days of the November term of the said court. the said defendants filed with their clerk of said court an affidavit for a continuance of said cause, and thereupon by their attorneys moved the said court that the said cause be continued which said affidavit is in the words and figures following, to wit.

FRANK PARMELEE, LIBERTY BIGELOW, DAVID A. GAGE, ET AL ads. JOSEPH W. HAMBLETON & DANIEL GOODMAN.	Cook County Court of Common Pleas. MECHANICS' LIEN.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

58.

Frank Parmelee one of the defendants in the above entitled cause, being duly sworn deposes and says that the said defendants, have fully and fairly stated their case in this cause, to W. K. McAllister of the city of Chicago, their counsel therein, and that they have a good and substantial defense on the merits in this cause, as they are advised by their said counsel after such statement, and which the said defendants verily believe to be true.

And he further says that John Whitney who resides in the city of Chicago and Harmon Lanckton, who is now residing in Bainbridge, Granger Co., Ohio, are each of them necessary and material witnesses for the defendants on the trial of this cause, without whose testimony and that of each of them the said defendants cannot safely proceed to the trial of the same.

And deponent further says that the said witnesses are each of them mechanics and that they are competent, credible and intelligent persons, and that he expects that

[12620-24]

58

59

60

61

the defendants will be able to prove by the said John Whitney, on the trial of this cause, that he the said Whitney saw the progress of the work done under the contract of the petitioners set out in their petition in this cause, nearly every day with some slight exceptions from the commencement of the said petitioners with their said job until they quit the same. And that from the commencement aforesaid to the time fixed in said contract for the completion of said job by the petitioners there were materials and work always in readiness for the use of petitioners in their said job, sufficient to have enabled them by procuring reasonable and adequate supply of laborers, and by prosecuting said work with proper dilligence to have completed said job within the time fixed in said contract for the completion thereof. And that this deponent in the month of August, A. D., 1856, at the place of said work requested and urged the petitioners to procure more help so as to complete said job within said time, stating to them that their money was ready to pay them as fast as needed if they would do so, and more particularly that deponent urged and requested them to proceed at that time and make the brick arches under the side-walks upon State and Randolph streets, to support the flagging in front of said building on said streets as provided by the contract, to which contract (as set forth in the said petition, deponent refers as a part of this affidavit,) and he expects to be able to prove by said Whitney, that the said petitioners during the greater part of the time of doing said work had an insufficient supply of men for said work and that they neglected to prosecute the same with diligence and fidelity, and that they wholly omitted and neglected (though requested to do the same at the proper time by deponent,) to commence the building of said arches, and work under the side-walks until late in the fall, when the season was cold and wet and that the same in part fell in, for that reason and for want of proper construction soon after they were built by petitioners. And that the said job of the petitioners for and during the period of about wo months after the time fixed for the completion thereof, was so far unfinished as to render said building entirely untenantable during that time and that the defendants sustained heavy damages by losing the use of said buildings during such time as aforesaid. And he further expects to be able to prove by said Whitney that such delay as aforesaid, in completing said job, was not the result of any unavoidable accident, nor of the default of the defendants in furnishing the materials required to be furnished by them or otherwise, but was the result of a want of diligence and fidelity on the part of petitioners, in the prosecution of the same, and furnishing the requisite number of laborers. And he further says that he expects to be able to prove by the said Lanekton, on the trial of this cause, that the witness worked upon the said brick arches, during their construction, under the direction of

61

the petitioners. And that the weather was cold enough at the time of said work to freeze the mortar and that instead of making the mortar rich and using a small quantity of it and putting the bricks in the arches aforesaid, close together, a large and improper amount of mortar was used, which on thawing necessarily gave away and displaced the bricks, and thus weakened the arches, for the reason of such use of mortar and the coldness of the weather and by the occurrence of a thaw, fell in, and also that said witness has worked at the masons trade for a great many years and has known many arches built upon the plan of these in question, and that if properly constructed, they are good and durable arches.

62

And deponent further says that on the twenty-fifth day of November inst., he caused the said John Whitney to be duly served with a subpoena in the cause issued by the clerk and under the seal of said court, requiring his appearance, (among others named therein,) in said court, on the 30th day of November inst., the day set for the trial of said cause, to testify on the part of the defendants. And he further says that the said John Whitney since the service of the subpoena on him as aforesaid, and on the 6 o'clock train, in the morning on the 26th day of November inst., without the permission, privity, or consent of the said defendants or either of them, left the city of Chicago to go to Rochester in the State of New York, to be absent for the period of about three weeks. That the said Whitney has and is interested in a large claim against the Detroit and Milwaukee Railroad Company, amounting as deponent is informed and believes to be true, to fifteen hundred dollars, which is past due and which said Whitney greatly feared he should lose. That during last week he received a communication from the agent of said Company. That if the said Whitney would be in Detroit on the 30th of November inst., the said claim would be settled and paid.

That said Whitney also had the settlement of a Railroad contract to build portions of a road in Canada in connection with one Orson Touslay, Charles Harrington and Everhed, which required his presence at the city of Rochester, New York, the middle of the present week by appointments by his co-contractors, as deponent is informed and believes to be true, and that his interest in said matters would greatly suffer unless he went there as required and he would unless personally present in all probability lose said debt $1,500.

63

And deponent further says the said Harmon Lanckton was at the time he so worked on the said arches as aforesaid, in the employ and under an engagement with one B. C. Howard, a master builder in Chicago, and was permitted to work on said arches under the direction of said petitioners for their accommodation, and on account of some neighborly dealings between said Howard and petitioners, but was paid for the said work, by the said Howard, which facts were until the 25th of November inst., wholly unknown to the said defendants or either of them.

That neither of the defendants had any acquaintance with the said Lanckton or until the 28th inst. knew his name. That deponent has endeavored in order to prepare for the trial of this cause, to ascertain the facts concerning the same, and the names of persons employed, by enquiring of the different employees of the petitioners, but has been unable from the prejudice or unwillingness of such employees to obtain any information solicited, and on the 25th November inst., while causing the witnesses in this case to be subpœned he acidentally and for the first ascertained the facts aforesaid, which he could prove by the said Lanckton, and immediately applied to the said Howard, for the name and residence of the said witness; but the said Howard had forgotten his christian name, and was unable to find out the same. And when the said Lanckton had gone to using every reasonable effort by looking over papers and making inquiries until the 28th inst., when for the first time deponent ascertained the name and residence of the said witness, and that he had left Chicago about six weeks ago for Bainbridge, aforesaid, to remain there during a month or two of the coming winter, and then return to Chicago. Doponent further says that said witness, as he has learned since ascertaining his name, is about 50 years of age, and a very candid, intelligent mason by trade, of a long and extensive experience in the different branches of his said trade in eastern cities. And at the time of working on the said arches as aforesaid, he was not in the employment of either of the parties to this suit, and is therefore a reliable witness, and that defendants do not know of any witness by whom they can so fully and satisfactorily prove the said facts as the said Whitney and the said Lanckton.

64

65

And deponent further says that this application for a continuance of said cause is made in good faith, and for the mere and sole purpose of securing to the defendants in this cause, on the trial thereof, their rights in the premises. And he fur-

[12120-67]

65

ther says, that he has no doubt but that the defendants can obtain the testimony, and the attendance of said witnesses for the trial of this cause, at the next term of this court.

FRANK PARMELEE.

Sworn this 30th day of November, A. D., 1857, before me John Forsyth, Notary Public.

The counsel for the petitioners, in opposition to such motion, called the attention of the court to certain statements contained in the deposition of Patrick Kerlihan, a witness on the part of the petitioners, which deposition had been taken on the 19th day of October, A. D., 1857, by the consent of counsel, and was then on file. The following Interrogatories had been put to the witness, viz:

Have you, within the last few days, had any conversation with the defendant, Frank Parmelee, with reference to the claim of Hambleton & Goodman, against him? If so, state when, and where such conversations took place, and what was said by either of you, on the subject ?

To which he answered as follows:

66

Yes, I have. The conversation was last Saturday morning, on the corner of State and Randolph streets. I asked him when the trial of Mr. Hambleton was coming off. He answered, that perhaps next month, but probably not until spring. I asked him if he meant to put the trial back. He said "If I possibly can." I think this is what he said, according to the best of my opinion. I was just leaving.

To the reading of which, on the hearing of said motion, the defendants, by their counsel, then and there objected, which objection was overruled by the court, and the said answer was read on the hearing of said motion, to which ruling of the court, the defendants, by their counsel, then and there excepted. And the counsel of the petitioners also stated to the court, and the counsel for defendant admitted John Whitney, one of the persons named in the foregoing affidavit of Parmelee, was father-in-law of said Parmelee.

{13620-49}

66

And the said court then and there denied the said application for a continuance of said cause. And the defendants, by their counsel, to said denial thereof by the court, then and there excepted.

67

That on the 3d day of December, A. D., 1857, said cause came on to be tried before the said court and a jury, and thereupon, the said petitioners, for the purpose of sustaining the issues in said cause, on their part, offered in evidence the contract between the said petitioners, and the said defendants referred to in said petition, and a copy of which is thereto attached.

68

And for the purpose of further sustaining the issues in said cause on their part, the said petitioners, by witnesses, introduced and sworn on said trial, gave evidence showing that they took possession of the ground described in said petition and contract, and commenced the excavations for foundation walls of the buildings to be erected thereon by them, on or about the 27th day of May, A. D., 1856, and that they were engaged in and about the erection and completion of said building from that time up to and until the 20th day of February, A. D., 1857. Said petitioners offered further evidence, tending to show that they were delayed in the prosecution of their work upon said building in the months of August, September and October, 1856, or want of timber, lintels, and the cast iron window caps and window sills, stone sills for one of the towers. That these materials were furnished by the defendants, but were not furnished in due and proper season, as they were required. And that the defendants paid the plaintiffs the sum of $86 62, being the wages of the men who remained idle while waiting for the iron caps and sills, as mentioned in the petition. That said delays occurred at different times during the months aforesaid, and that in consequence thereof, the petitioners could not employ, to good advantage, so many men upon said building as they otherwise might have done; and could not proceed with the work any more rapidly than they did. Further evidence was given on the part of the petitioners, tending to show that they commenced the laying of the front walls of the building on State and Randolph streets, on the 11th day of August 1856; that for the purpose of laying the outside tier of brick, a scaffold was necessarily used, resting upon upright poles, four or five feet distant from the wall, and that said front walls were finished and the scaffoldings removed on or about the first day of November, 1856. That in the month of October, A. D., 1856, the petitioners, at

68

69

the request of the said defendants, commenced the excavations under the side walks, on State and Randolph streets, and were getting ready to build the brick arches for the vaults which were to be constructed beneath the side walks, and on a level with the basement story or cellar of the building, and intended for the use of the building. That the masonry of said vaults was built up to and connected the front walls of said building on State and Randolph streets, and extended out from said walls sixteen or eighteen feet. That the petitioners having built all the side walls of the vaults, and the supports for the arches, commenced the construction of said arches on or about the 5th day of November, 1856, and in the course of three or four days had put up all of said arches on State street, and a few upon Randolph street, and the defendants had begun to place upon the arches, the flagging stone for a side walk, when the arches commenced falling in, and very soon all the arches on State street, and all but two or three on Randolph street had given way and fallen. And at the request of the superintendent, the remaining arches were taken down, and the brick of the arches that had fallen were removed by the said petitioner, and no more arches were built, but in place of the brick arches and flagging stone, the defendants afterwards constructed a plank sidewalk around the building.

~~70~~

Petitioners further offered evidence intending to show that the plan of the arches intended to support the side walks was defective, and that they fell because of the defects of the plan.

70

Petitioners introduced further evidence tending to show that they were delayed in the completion of the plastering of said building by the cold weather, and in procuring stoves for heating the rooms in which the plastering was to be done and for want of some cut stone work for door sills which were to be furnished by the defendants and without which the building could not be completely enclosed. That the roof could not be put on until the front walls were up. And that the inside work could not be done until the roof was on. That after the roof was on the petitioners followed up the carpenters without delay and finished the inside work as soon as practicable.

[12000-70]

70

The petitioners also introduced in evidence the certificate of the architect, Wm. W. Boyington, referred to in the petition, and a copy of which is therein contained and also gave evidence showing the truth of the statement in the petition, as to the interest and title of the defendants in and to the premises, and showing that the defendants were in possession the premises as described and mentioned in the petition.

71

The petitioners further gave evidence tending to show the amount and value of extra work done by them and in connection with said job, and mentioned by them in their said petition in this cause.

The petitioners also offered to give evidence to show that they had sustained the special damages mentioned in the petition, but the defendant's counsel objected to such evidence on the ground that if such damages were in fact sustained, they could not be allowed in this proceeding, and that there could not be any lien upon the premises for such damages, which objection was sustained by the court and the petitioners were not allowed to give any evidence as to such alledged damages.

In every instance where the petitioners gave evidence to substantiate the allegations as above stated, such evidence consisted of the testimony of at least two witnesses.

72

The defendants for the purpose of sustaining the issues in said cause on their part thereupon by witnesses introduced and sworn gave testimony tending to show that the petitioners did not prosecute their work on said building diligently, particularly in the early part of the season, and that they consumed a disproportionately large part of the season in the construction of the foundation and partition walls. That they were not delayed to any considerable extent for want of the iron and cut stone work, and that if they had prosecuted the work diligently and vigorously after the last of the iron and cut stone was on the ground, they might have finished their

[illegible]

72

portion of the work on said building by the first day of December A. D. 1856, when in fact they did not finish the plastering of the building until about the 20th day of February 1857.

The defendants further offered evidence tending to show that it was not necessary to have outside scaffolding in the putting up of the front walls, and that said walls might have been laid up from the inside and that the petitioners might have commenced their work upon the arches for the side walk much earlier in the season than they did and have finished them during warm weather of the Summer or Autumn.

That when they commenced building said arches the weather was cold. so that the mortar froze between the bricks. That the season was very unfavorable for the construction of such arches and that the petitioners had notice from the Superintendent of the building not to build the arches at that time and that in going on with them at that time they assumed the responsibility of making them stand.—

73

That the arches were not properly built by the petitioners according to the plan, and that they were so informed by the Superintendent soon after they commenced building them.

That the plan of the arches was a good one and suitable for the purpose intended and if properly built so as to carry out the plan, they are strong and firm. That other arches built upon the same plan and properly constructed have stood firm for years without any indication of settling or giving way. That in warm weather is the proper time to build such arches.

The defendants further gave evidence showing that they had paid to the said petitioners for work done and materials furnished by them on said building the sum of fifteen thousand eight hundred and eighty-five dollars.

73

It further appeared from the evidence introduced by the defendants, that the excavations for the brick arches, and the arches constructed in said excavations were made and constructed outside of the line of the lot described in the petition and in the public streets of the city of Chicago.

74

1. The plaintiffs council thereupon asked the court to instruct the jury as follows:

The Plaintiffs are not to be charged with delay in doing their work, if such delay was caused by the defendants or was owing to the want of materials, which the defendants were to furnish.

2. The plaintiffs are not responsible for the failure of the arches, if such failure was owing to a defective design.

3. There is no issue made by the pleadings as to the *location* or *description* of the premises upon which the work was to be done. If the jury believe from the evidence that the work was done upon the premises mentioned in the petition, then the plaintiffs have a lien upon the premises if anything is due them for such work.

4. If the jury find anything due the plaintiffs they will allow interest at the rate of six per cent per annum, from March 9th, 1857.

Which said instructions so asked for by the council for the said petitioners were given by the court and to the giving of said instructions, and each of them separately by the court the defendants by their counsel than and there excepted.

75

The counsel for the defendants then asked the court to instruct the jury on the part of said defendants as follows, to wit:

1. If the jury find from the evidence that the brick arches in question, and the excavations in which they were placed were made within the street or streets of the city of Chicago, and were not in fact upon the lot or land described in the petition in this cause, the jury will as to all items claimed by the plaintiffs for that work find for the defendants.

2. That if the jury find that the claim of the plaintiffs in this cause, includes a portion of work done and performed within the streets of the city of Chicago and not upon the lot or land described in the petition, which said work so done off from said lot or land together with that which was done on said lot or land, was performed under one and the same contract, and the contract in evidence, the claim for the whole work is not divisible, or to be apportioned, and the plaintiffs having no lien for the work done within the streets and not upon the land described, cannot by reason of the indivisibility of the demand have a lien for any part of the same.

75-6

3. That under the contract and specifications between the parties, and read in evidence, the plaintiffs are themselves bound to furnish all the stone and iron window caps and sills and also the cut stone to be used in doing the work on the building under said contract and specifications. And if the jury shall believe that there was any delay of said work on account of said materials or any of them not being furnished at the time they were wanted by plaintiff on said job, such delay is no legal excuse for the plaintiff in not completing said job within the time specified in said contract for such completion, and they will find for the defendants.

76

4. That the parties in this case have fixed on a certain mode by which the amount to be paid under the contract in question shall be ascertained, and having done so, the party seeking an enforcement of the agreement must show that he has

76

done everything on his part to carry it into effect, and he cannot compel the payment of the amount claimed unless he procure the kind of evidence required by the contract or show that by time or accident he is unable to do so. And if the jury find that a certificate of the amount due has been given by the architect, the plaintiffs cannot take part of it as evidence of extra work done, and reject the other parts of it, but the same must be taken together in all its parts as to amounts, if one part is taken.

77

5. If the Jury find from the evidence that the plaintiffs failed to make the brick arches in question in accordance with the contract and specifications between the parties respecting them, or if the architect of said work gave them directions as to the manner of doing said work, and the plaintiffs failed to comply with such directions, or if they performed said work in an unskillful, unworkmanlike and improper manner, then the plaintiffs have failed to complete their said contract, and cannot recover in this suit, whether the design for such arches was good and sufficient, or not."

Of which said instructions the first, second, third and fourth were refused, and the last was given by the court. And to the ruling and decision of the court, in refusing said first, second, third, fourth instructions, and each of them, so asked for by the said defendants, as aforesaid, the defendants, by their counsel, then and there excepted, and the jury having retired, to consider of their verdict, returned into court with the following verdict, to wit:

78

We, the jury, find a verdict for the plaintiffs to the amount of Four Thousand Nine Hundred and Seventy-two and 28-100 Dollars.

R. S. Hicks, Foreman, which said verdict included the unpaid balance of the contract price, the amount of the extra work, and interest on the same from the 9th day of March, A. D., 1857. And the said defendants, by their counsel, then and there moved the court to set aside the verdict of the Jury, and to grant to the said defendants a new trial, which motion was overruled by the court. To which decision of the court, in overruling said motion, the defendants, by their counsel, then and there excepted, and prayed an appeal to the Supreme Court, and that this bill of exceptions might be sealed by the Court, which is accordingly done.

JOHN M. WILSON. {SEAL.}

213

Pe[illegible]

vs

Hamilton & Co.

Filed Apl 2

S. S. [illegible]

Clerk

Supreme Court

Frank Parmelee et al

vs

Hamberton v. Goodman

The third Instruction given on the part of the Plffs below, is clearly Erroneous,

The Jury are told by the Court, that there is no issue made by the pleadings as to the location or description of the premises upon which the work was to be done. The fair import of that language is that, it is admitted by the pleadings, that the work was done on the premises described, which is not true. See 1-2-3 pages of Abstract as to allegations of bill in reference to written contract, & page 4 as to Extra work Now the answer admits the making of the written contract (See pages Abstract 18th page) it also says thus "The said defts also say that said Contract was made respecting the said lands and premises described in said petition (page 19) but says not one word respecting the Extra work.

There is, then no admission as to Extra work whether it was done on the premises described or whether it was done at the request of the defts; And not being admitted or denied, the Plffs were bound, thus being a Chancery proceeding to prove the allegations.

DeWolf vs Long 2 Gil 679

3/12/20-76

The Statement of the Court that there was no issue in the pleadings as to whether the work was done on the premises, would, as a proposition of law, induce the Jury to infer that the work was in fact done on the premises described, or the defts would have taken issue on it, or else that it was admitted altogether.

Then the other branch of the instruction, and which seems to be a distinct proposition, is still worse, "If the Jury believe from the evidence that the work was done upon the premises mentioned in the petition, then the plffs have a lien upon the premises if any thing is due them for such work,"

The Court must bear in mind that plffs claimed five hundred dollars for Extra work, and the defts could not be legally liable at all for that work unless it was done upon request, and the 1st Sec of the Lien Statute, (See R S 1845 page 345,) is that "any person who shall, by Contract with the owner of any piece of land &c furnish labor" &c There is no such hypothesis included or intended as that if the Jury shall find that such work was done ~~under~~ upon ~~any~~ request by the defts, or under any contract Express or implied; but the mere fact that the work was done on their premises, is made

[1850-77]

a foundation for the lien; ~~Such~~ Services performed on the defts premises, however meritorious they might be or praiseworthy, such as saving his property from fire, if not done upon request, form no ground for an action,

Bartholomew vs Jackson 20 Johns R 28

And if services done upon ones land, would not be the ground of an action without a request or Contract, they certainly could not create a lien under the Statute,

The latter clause of the said instruction does not cure the defect, if they believe the work was done on the premises, then the plffs have a lien upon the premises, if any thing is due them for such work, That is submitting the law to the jury, to be found by them, unless the instruction means, that if they had done work on the premises, which has not been paid for, then the plffs have a lien upon the premises,

Sup Court 213

Frank Parmelee et al
vs
Hambleton & Goodwin
Points.

94

Sup Court 213

Frank Parmelee et al
vs
Hambleton & Goodwin
Pouts.

94

SUPREME COURT.

SUPREME COURT.

JOSEPH W. HAMBLETON, & DANIEL GOODMAN, *ads.* FRANKLIN PARMELEE, et. al. } *Appellees.* / *Appelants*

Brief of Counsel for Appellees.

I. There was no error in the decision of the Judge, in refusing to grant a continuance.

A party is not entitled to a continuance as a matter of *right*, except in the cases provided for by the *Practice Act*.

Ault vs. Rawson, 14 Ill.—190.

Section 13 applies only to civil common law cases.

Baxter vs. The People. 3 Gil.—372.

This being a proceeding by Petition to enforce Mechanic's Lien, the rules of Chancery Practice are to govern.

R. S. Chap. 65; Sec. 23. Kimball vs. Cook. 1 Gil.—423.

If Section 23 of the Practice Act applies to this case, then the question is this—viz:

Rex v. D'Eon 3 Burrow R. 1124

Should the Judge, exercising a sound discretion, have granted the motion?

The affidavit does not show but that the Defendants knew that the witness Whitney was intending to go away. If they knew it they could have taken his deposition.

Abstract - page 25.

Kimball vs. Cook. 1 Gil—430.

As to the witness Lanchton—the substance of the affidavit, taken in connection with the answer, is, that the Defendants did not learn until the 25th of November that he was employed by Howard.

Ab. - p. 26

But the deposition of Keilihan shows that the Defendants were acting in bad faith; that on the 17th day of October—more than a month before Whitney went away, or they had discovered that Lanchton was an important witness for them, the Defendant Parmelee stated that probably the cause would not be tried until Spring, and that he meant to put the trial back if he possibly could.

Ab. p. 27

The suit was commenced April 2d, 1857, in the Circuit Court, and on the day it was called for trial at the May term, the Defendants procured a change of venue to the Common Pleas, which put off the trial until December. Under the circumstances the Judge was warranted in thinking that the motion for a continuance was not made in good faith.

II. The Judge was right in refusing the 1st and 2d instructions asked for the Defendants as to the work under the side-walks, because

1st. The Jury were to try nothing but the issues made by the pleadings, and no such question was in issue.

R. S. Chap. 65. Sec. 7 and 8. Daniels Chy. Rep. p 992.

The questions in dispute were *not* as to *where* the work was

Ab - p. 2-3
" " 19

{12620-12}

done, but only as to *the manner* in which it was done and as to the *cause of the delay.*

2d The Defendants, as the owners of the lot, had the title to the middle of the street. The premises are described as bounded "on the north by Randolph Street and on the south by State St." The public had merely a right of way with which these vaults in no respect interfered, consequently the vaults were in fact on the land of the Defendants. There was no evidence that the title to the streets was vested in the city of Chicago. That could not be unless a plat had been regularly made, acknowledged and recorded.

R. S. Chap. 25; Sec. 21. Manly vs. Gibson. 13 Ill: p 312.
Stith's Leading Cases, vol. 2, p 187–190.

3d. Even if the question *where the work was done*, had been before the Jury, and it had been proved that the title to the streets was in the city, yet the petitioners would have a lien upon the lot for the work on the vaults.

The statute gives the lien not only for erecting or repairing any building but also for erecting or repairing the appurtenances of any building.

R. S Chap. 65; Sec. 1.

An appurtenance is defined as being "something belonging to another thing as principal, and which passes as incident to the the principal thing."—*Bouvier's Law Dictionary.*

"These vaults were constructed beneath the side-walks and on a level with the basement story or cellar of the building, and intended for the use of the building. The masonry of the vaults was built up to and connected with the front walls of the building and extended out from said walls sixteen or eighteen feet." (See Bill of Exceptions.) Does not this describe an *appurtenance* to a building? Would not a deed of the lot convey this appurtenance?

Ab-1-29-

But even if the statute did not contain the language referred to, yet the mechanic would have a lien on the lot for building such vaults. It is well known that in cities, vaults of this description are allowed by the city authorities, to be built under the side-walks, and are used chiefly for receiving coals. The right to construct and use such vaults constitutes an *easement*, or, as it is termed in the civil law, a *service* or *servitude*, which, as long as it exists, is appurtenant to the land or lot with which it is connected, passes by any conveyance of the land, and cannot be severed from it.

Haddan v Shantz-
13 Ill-583

Smith's Leading Cases. Vol. 2; p. 187-8.
4 Kent Com.—518.—467
Domat's Civil Law, Sec. 1031.

This is materially different from the case where the claim is for paving a street or flagging a side-walk. Such improvements are made under the direction of the city authorities, and are intended chiefly for the benefit of the public, and may not, to any considerable degree, enhance the value of the lot. But vaults under side walks are for private use alone. If they are judiciously planned and well built, they add to the value of the lot just as much, in proportion to their cost, as the main building itself.

Why, then, should not the mechanic have a lien upon the lot for the labor and materials which have so increased its value?

III. The Judge was right in refusing to give the 3d

Instruction asked by Defendants, as to the construction to be given to the contract.

As regards the iron window caps and sills, it is evident from the specifications, that the Petitioners were not to furnish them. Iron work is not masonry. They were to furnish certain iron anchors, and were "to *set* all stone and iron window caps and sills in a thorough manner." As to the stone sills in question, the contract and specifications alone do not enable us to determine who was to furnish them, but we are referred to the plans. The Appellants have not thought it advisable to have those plans included in the Bill of Exceptions, nor does it appear that the Bill of Exceptions contains all the evidence given on the trial. This is a sufficient answer on this point, but we can go further.

Al. - p. 15

" p. 14 - under head of "Cut Stone"

The Petition states that the Petitioners were delayed for want of this iron and stone work which was to be furnished, and was finally furnished by the Defendants; that on one occasion the Defendants promised to pay the wages of the workmen who should remain idle while waiting for the iron work, and did accordingly pay $86 62.

Al. - p. 4

" p. 5

The answer does not deny that this iron and stone work was to be furnished by the Defendants, but denies that there was any default on the part of the Defendants, and claims that the delays were owing to the Petitioners not prosecuting the work when the weather was suitable, and to an improper arrangement of the work, except the delay for which the $86 62 was paid as aforesaid.

" " - 19

" " 19

The Bill of Exceptions states that some of such stone work, (the stone door sills) were to be furnished by the Defendants, and that evidence was given tending to show that all the stone and iron work in question was furnished by the Defendants but not as soon as required.

" " 24

" " 26

This, then, seems to be the state of the case, viz: both parties supposed that the Defendants were to furnish these caps and sills, and the Defendants did in fact furnish them. When the pleadings were put in, the Attorneys for the respective parties must have been of the same opinion. On the trial the counsel for the Defendants seek to have a construction given to the contract different from the one given to it by the parties, and ask for an Instruction, part of which was clearly wrong, and no part of which, as far as this Court can discover from the record, was clearly right. The Instruction asked was properly refused. To have given it would have been error.

Vallamer S. King, 3d Barbour S. C., Rep. 548.

IV.—The fourth instruction asked by the defendants mistates both the fact and the law. If it had been given, it would have misled the Jury. The substance of the instruction is: 1st, That the petitioners were not entitled to payment except upon a certificate from the architect; 2d, That if they claimed any benefit from any portion of such certificate, they were bound by the whole of it.

By the terms of the contract, the superintendent is to decide

as to all matters in dispute, &c.; but the contractor has the right of appeal to arbitrators.

The petition states that after the work was completed, the petitioners applied to the architect for a certificate, and he gave one, in and by which he made certain decisions as to the claims of the petitioners; that, among other things, he allowed them $497 for extra work; but claimed to deduct, for brick arch sidewalks, $500, and for twenty days delay, $2,000; that the petitioners appealed from the decision of the architect in relation to the sidewalks and in relation to delay; but, failing to agree upon arbitrators, both parties concluded it was best to have the dispute settled by suit. The answer does not notice the allegation as to the certificate, and it was therefore necessary for the petitioners to prove that such a certificate was given, that being one of the material facts in the case.

If the certificate is treated as an admission on the part of the defendants, or of their agent, the rule of law requires that if the petitioners offered in evidence any portion of it, they should offer the whole, and they did so. But they were not therefore concluded by its statements. They had the right to show, and the Jury had the right to find that the allowance for extra work was correct, and that the deductions for the brick arches and for delay were unjust. The petitioners gave other evidence on both of these points; and the Jury, by their verdict, sustained the claim of the petitioners.

V.—The petitioners were entitled to interest from March 9th, 1857:

1st, On the account for extra work, because on that day that account was settled, and the sum due was agreed upon;

2d, On the balance due on the contract, because, by the terms of the contract, it was due on the completion of the work.

It is true, that by the terms of the contract, the work is to be done to the satisfaction of the architect, and he is to give a certificate that the unpaid balance of the contract price is due, subject however to appeal from his decision. The refusal of the architect to be satisfied and to give such certificate, when he was in duty bound to be so satisfied and to give such certificate, was a fraud upon the rights of the petitioners, and could not operate to prevent the money becoming due at the time when such certificate was applied for, and should have been given. The architect claimed to make certain deductions from the contract price. The petitioners refused to acquiesce in such decision. The Jury have found that the petitioners were right and the architect wrong; that no such deductions should be made; that the balance on the contract was due on the 9th March, and the architect should have so certified. This suit could not be commenced until the money was due. If it has ever been due, it was due on the 9th March; and being due on a contract in writing, we are entitled to interest rom that time.

a 4

Parmalee et al

Brief of Goodrich & Fawcett
Counsel for Appellees

Scales

should have been continued

bring to allow interest - The petition treats the contract as an open one

4

Farwell for dept.

This is a chancery proceeding -

14 Ill 490

5 The party must bring himself within the statute to entitle him to cont.

3 Gil 372 Stat only applies to civil com'l proceedings

6

16 Ill Writings may appear after application for cont.

SUPREME COURT.

FRANK PARMELEE,
LIBERTY BIGELOW,
DAVID A. GAGE &
WALTER S. JOHNSTON,
vs.
JOSEPH W. HAMBLETON &
DANIEL GOODMAN.

Appeal from the
Cook County Court of Common Pleas.

MECHANICS' LIEN.

Abstract of Record.

This suit was commenced by filing a petition, to April term, A. D. 1857, of the Cook county Circuit Court, for the enforcement of a Mechanics Lien, under the statute. At the June special term of the Circuit Court, the said cause was transferred to the Cook county Court of Common Pleas. And the petition, answer and other papers in the case duly filed in said Court of Common Pleas. The said petition is as follows:

STATE OF ILLINOIS, } ss.
COOK COUNTY.

To the Honorable George Manierre, Judge of the Circuit Court of Cook Co.:

The petition of Joseph W. Hambleton and Daniel Goodman respectfully shows unto your honor, that your petitioners are masons by trade and are partners doing business in the city of Chicago, in said county under the name of Hambleton and Goodman.

That Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnson, on and before the 27th day of May 1856, possessed and occupied a certain parcel of land situate in Chicago aforesaid, and described as follows, to wit: Bounded on the North by Randolph street, on the West by State street, on the

Money due on any instrument in writing draws interest whether the amount due is liquidated

There is no instance that the Statute was ever pleaded according to the statute & it is only in such cases that the fee is ~~[illegible]~~ in the city Here the common law principles & the lot goes to the middle of the Street

Goodrich for Supt.

1791 and not own the land

6

South by the brick barn of Frank Parmelee & Co., and by the lot lying next south of said barn, and on the east by said barn and by an alley, being about one hundred and twenty-four feet on State street, by about one hundred ond fifty-one feet on Randolph street. Which lands were and are held by them under and by virtue of certain leases before them made by the owners of the above described premises for a long term of years. Which term will not expire for a number of years yet to come. That on or about the said 27th day of May, the said Parmelee, Bigelow, Gage and Johnson by their company name of "Frank Parmelee & Co." made and entered into a contract in writing with your petitioners of which contract the following is a copy, viz..

7

These articles of agreement made and entered into this 27th day of May, A. D., 1856, between Hambleton and Goodman of the first part, building contractors of the city of Chicago, and Frank Parmelee & Co., of the same place of the second part witnesseth,

That the said Hambleton & Goodman or executor's administrators and assigns, for and in consideration of the payments hereinafter to be made to them by the said F. Parmelee & Co., or their legal representatives, do on their part contract and agree to build finish and complete in a careful, skillful and workmanlike manner, to the full and complete satisfaction of Wm. W. Boyington or assistant superintendent, and by and at the times mentioned in the foregoing specifications, the masons and stonework of a five story block and basement of stores and offices, that is to be erected on the corner of Randolph and State, as aforesaid, so as fully to carry out the designs of said work as it is set forth in the foregoing specifications and the plans and drawings therein especially refered to. Said specifications and plans and drawings, being hereby declared part and parcel of this contract.

8

And the said Frank Parmelee & Co., or their executors administrators or assigns, for and in consideration of the said Hambleton & Goodman doth fully and faithfully executing the aforesaid work, so as to fully carry out the design for the same, as set forth by the specifications. And accordingly to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of Wm. W.

[10120-B]

8

Boyington, or his assistant superintendent as aforesaid, and at the times mentioned in the foregoing specifications doth hereby agree to pay the said the sum of Twenty Thousand Three Hundred and seventy-four dollars $20,374 in the manner following viz.: As the work progresses, the superintendent is to make out estimates from time to time, of the work and material in-wrought into the building and upon presentation of a certificate from said superintendent of eighty-five per cent on said estimate. The said Frank Parmelee & Co., or their legal representatives are to pay the amount from time to time, and the balance fifteen per cent is to be paid together with any other balance that may be due to said Hambleton & Goodman, upon the completion of the contract as aforesaid, provided the said superintendent shall certify in writing that they are entitled thereto.

In Witness whereof, the parties hereto have set their hands the day and year above written. (Signed)

HAMBLETON & GOODMAN.
FRANK PARMELEE & Co.

9

That specifications mentioned in the said contract is hereto annexed and marked schedule A, and is made a part of this petition, excepting, however, that the words in said specifications contained under the head of "damages" and relating to unavoidable delays, were added some few days after the said 27th day of May, with the consent and by the directions of the parties to such contracts and for the purpose of making such addition a part of such contract.

And your petitioners further show that the premises first above described, and which are hereinbefore stated to have been possessed and occupied by the said Parmelee, Bigelow, Gage and Johnson are the same premises referred to, in the said contract and specifications and are the same lands and premises upon which your petitioners performed the work, furnished the materials and put up the buildings as hereinafter stated.

And your petitioners further show that immediately after making such contract

10

they proceeded to the performance of the same, on their part, and did all the work and furnished all the materials to be by them done and furnished according to the provisions of such contract, and would have completed the work and the several parts thereof within the times specified in such contract if they had not been prevented by causes of delay that were unavoidable on their part, and if they had not been delayed said Frank Parmelee & Co. And if they had not been obliged to wait for certain iron work and castings which were to be furnished and which were finally furnished by the same Frank Parmelee & Co. That your petitioners were obliged to wait for lintels to be placed over the iron columns, and for the iron window caps and sills, and for the stone sills of the south tower, and for the carpenter work to be done, and for the building to be shut up and warmed so that the plastering would dry.

11

Your petitioners further show unto your honor, that by reason of the neglect of the said Frank Parmelee & Co., in the particulars above mentioned and by reason of the said delay consequent thereupon your petitioners were put to great expense and suffered great loss and damage, inasmuch as they could not keep their men at work to advantage, and the men were frequently idle for want of work, and your petitioners were obliged from time to time to discharge their men and then to hire again at higher wages, and were obliged to complete the job when the days were short, and during the cold weather of the fall and winter, when it necessarily cost them a much larger sum, than it would if they could have done such work at the time contemplated when such contract was made. Which loss and damage so sustained by your petitioners to the sum of Ten Thousand Dollars, besides the sum $86,62, a claim for money paid as hereinafter mentioned. That your petitioners frequently complained to the said Frank Parmelee & Co., and to their architect and agent, the said Boyington of each delay and notified them of the damage which your petitioners were sustaining in consequence thereof.

Your petitioners further show unto your honor that at the request of the said Frank Parmelee & Co. and under the direction of the said superintendent they furnished materials and performed work in addition to that which was specified in the contract, of the value of Five Hundred Dollars or thereabouts.

12

Your petitioners further show that they made an agreement with one William

[12620-B]

12

Ford by the terms of which agreement he was to lay up the front wall of the building, and he employed a sufficient number of competent workmen and would have completed his job in the month of August if he had not been delayed through the default of the said Frank Parmelee & Co., in the particulars above mentioned, That his men were frequently without work, and he was on several occasions obliged to dismiss a number of them while waiting for said iron work. That finally the said Frank Parmelee & Co. either personally or by their said architect requested that the said Ford should retain his workmen and promised to pay their wages for such time as they should thereafter remain idle for want of iron work so to be furnished by the said Frank Parmelee & Co. That pursuant to such request, the masons and laborers were detained and paid by said Ford, and your petitioners for time that they were idle from the 22nd to the 26th of September the sum af eighty six dollars and sixty two cents.

13

And your petitioners further show unto your honor, that your petitioners having ta length fully comp'eted their job, and having faithfully kept and performed the said contract, on their part, did, on or about the 1st day of March last past, present to the architect and superintendent, the said Wm. W. Boyington, their account and claim for the extra work and materials, which they had so done and furnished, as above mentioned, which account also included the items of the said claim of $86 12-100, being for money paid at the request of said Frank Parmelee & Co., as above stated. That your petitioners and the said Boyington looked over such account, and made divers corrections in the same, and mutually agreed that the amount due thereon unto your petitioners, for such extra work and materials, was the sum of $497, and that the said sum of $86 12-100, was also justly due to your petitioners. That thereupon your petitioners applied to the said Boyington to give them a final certificate for the balance due them, of the price mentioned in said contract, and also for the amount due for such extra work and materials, for said money paid.

13-14

And your petitioners further show that on the 9th day of March last past the said Boyington delivered unto your petitioners a certificate of which the following is a copy, viz.:

Chicago, March 9th, 1857.

I hereby certify that I have carefully examined all the variations from the

14

contract by which Messrs. Hambleton & Goodman, on the 27th day of May, A. D. 1851, agreed to the masonry and stone work, and furnish materials for a block of stores and offices situated on the corner of State and Randolph streets for Messrs. F. Parmelee & Co. I find that Messrs. Hambleton & Goodman are entitled to an allowance of four hundred and ninety-seven dollars

for various extra work &c.....		$497,00
Amount of contract,.....		$20,374,00
		$20,871,00
Messrs. Hambleton & Goodman are also deficient in point of not fulfilling contract and work charged, making some parts less than was called for in the contract, viz.:		
For brick work and plastering omitted,.....		$1,874
" brick arch side walks,.....		$500,00
" twenty days delay in finishing the building as provided in contract.....	$200,000	2,568 74
		$18,302,26
Payments as per certificate from time to time,.....		$15,885,00
		$2,417,35

WM. W. BOYINGTON,
Superintendent.

15

Your petitioners further show that they at once appealed from the decision of the said Boyington, as will appear from the following notice which they served upon the said Frank Parmelee & Co., and upon the said Boyington on the 12th day of March.

GENTLEMEN,

Having fully performed on our part the contract entered into on the 27th day of March, 1856, with Frank Parmelee & Co., we applied to Wm. W. Boyington the superintendent, for a final certificate for the balance due us. On the 9th day of March instant, he delivered to us a certificate in which he among other things professes to decide and certify that we are deficient in point of not fulfilling contract and work charged. Making some parts less than was called for in the contract, to wit,

For brick arch side walks,..... $500,00

[12650-87]

15

Twenty day's delay in finishing the building as provided in contract, ... $2000,00
Thereby leaving the balance due us only, ... $2,417,27

We claim that whatever damage or loss may have been sustained in relation to the brick arch side walks, resulted from a defective design furnished by said superintendent and that whatever delay there was in finishing the building was unavoidable on our part and was caused by you or by some of you.

16

You will please take notice that we hereby protest, against the above mentioned decision of the said superintendent, and as provided for in said contract appeal from such decision to an arbitration to be chosen indifferently. And we propose as arbitrators the following named persons, to wit, Thomas Wilner, Levi H. Waterhouse and William H. Carter, each of whom is, as we believe disinterested, and fully competent to act as such arbitrator. If you are willing to submit to such arbitration please notify us or our attorneys, hereinafter named, of such willingness without delay, so that we may if possible agree with you upon the persons to act as arbitrators. Our attorneys above referred to are Messrs. Goodrich, Farwell and Smith, whose office is 47 Clark street. If you do not on or before the 16th instant, notify us or our attorneys of your willingness to submit to such arbitration. We shall conclude that you refuse to arbitrate, and we shall be compelled to commence sult to enforce our claim against said Frank Parmelee & Co.

Dated March 11th, 1857.

Very respectfully yours,

HAMBLETON & GOODMAN.

To Messrs. Frank Parmelee & Co., Mr. Wm. W. Boyington.

17

Your petitioners further show that after such certificate was given by said Boyington as aforesaid, they called on him and inquired of him why he had neglected to include in said certificate the said sum of $86,62, and he admitted that it was omitted by mistake, and then gave them a separate certificate for that amount, which amount the said Frank Parmelee & Co. afterwards paid to your petitioners.

Your petitioners further show that it is *true* as was in said notice stated, that

17

whatever damage or loss was sustained in relation to the "brick arch side walks" resulttd from a defective design furnished by said Boyington and that the work done by your petitioners was done well and in strict compliance with the contract, and according to the designs furnished, that the said brick and side walks were nearly completed, when they gave way, and it was evident that arches built according to such design would not be sufficient, and your petitioners were directed not to complete them but were told that they must remove the materials provided and used for such arches, which instructions by said Boyington your petitioners followed.

18

Your petitioners further show that although the said Frank Parmelee & Co., after receiving such notice at first consented to such arbitration, and agreed with your petitioners upon persons to act as arbitrators, yet the said Frank Parmelee & Co. finally concluded not to submit to such arbitration. That on the 25th day of March the said Parmelee called at the office of the said attorneys and informed them that the persons whom they had named were not willing to act, that they (the said Frank Parmelee & Co. meaning,) had not been able to find suitable men who would act as arbitrators in the matter, that they had concluded not to try any farther, and that they had rather leave the matter to the decision of twelve men, than to any three men they would be able to get. Your petitioners therefore claim that the said Frank Parmelee & Co., are justly indebted to your petitioners as following, viz.

19

The balance of the price mentioned in the contract after deducting all payments and also deducting the said sum of $18,74 for brick work and plastering omitted and also allowing for the materials taken from the brick arch side walks, and for the value of the work remaining to be done on the said side-walks, when your petitioners were instructed not to complete them	$150	$4,260,26
For extra work and materials,		497,00
For damages sustained through the default of said Frank Parmelee & Co. above set forth,		2000,00
Total		$6,757,26

Your petitioners further show that as they are advised and verily believe they have a lien upon the said land and upon the leasehold interest of the said Frank Parmelee & Co. in and to said land, and upon the said building for the sum so due them as aforesaid. And they ask the aid of this honorable court in the premises, and pray that such lien may be enforced, and that a judgment or decree may be made direct-

19

ing the sale of said leasehold interest and of said buildings, and of all the right, title, and interest of the said Parmelee, Bigelow, Gage and Johnson, in or to the said land or buildings, to pay the sum due to your petitioners as aforesaid, and that such other further, or different order or decree may be made in the premises as to your honor shall seem meet, and as shall be agreeable to equity.

20

Your petitioners further pray that a summons may issue from this court directed to the sheriff of Cook county, to summon the said Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnson, returnable to the next term of this court to cause them to appear and answer this petition.

DANIEL GOODMAN,
JOSEPH W. HAMBLETON.

GOODRICH, FARWELL & SMITH, *Soliciters for Petitioners.*

STATE OF ILLINOIS, }
COOK COUNTY, } ss.

The above named Joseph W. Hambleton and Daniel Goodman being severally duly affirmed, each for himself doth say that he has heard read the foregoing petition and knows the contents thereof, and the same is true according to the best of his knowledge and belief.

JOSEPH W. HAMBLETON.
DANIEL GOODMAN.

This 2nd day of April, 1857,
Wm. L. Church clerk.

"SCHEDULE A."

21

SPECIFICATIONS FOR THE MASONS: Work and materials required for the erection and completion of a block of pressed brick stores and offices that F. Parmelee & Co. are about to have built on the corner of State and Randolph streets, in front of and in connection with the walls of the omnibus barn.

Special reference will be had by the contractor to the following specifications, and

21

the accompanying designs, as made by Wm. W. Boyington, architect, and which consists of the following drawings, to wit:

Plan of Foundation, and Vaults under walk.
" " Basement.
" " Main Floor.
" " Second "
" " Third and Fourth Floors will be the same as the second floor. Fifth Floors will be only finished in towers.

DUTIES OF CONTRACTOR: He shall be strictly held to make such work, and to use such material as is hereinafter described, and to work up the building to the given design, and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions, without reference to what the drawing may measure on its scale. He will be further held to submit as to the character of the materials used and the work done, to the judgment of the superintendent, and to procure from him all necessary interpretations of the design, and all necessary certificates, regarding his payments.

22

SUPERINTENDANTS AND THEIR DUTIES: Boyington & Wheelock, or assistant architects, are declared to be the superintendents of the work for the owner. Their duties will consist in giving, on demand, such interpretations, either in language, writing or drawing, as in their judgments the nature of the work may require, having particular care that any and all work done, and materials used for the work, be such as is hereinafter described, in giving, on demand, any certificates that the contractor may be entitled to, and in settling all deductions of, or additions to the contract price which may grow out of alterations of the design, after the same is decla ed to the contract. Also determining the amount of damages which may accrue from any cause, and to particularly decide upon the fitness of all material used, and work done

The contractor being bound in all cases, to remove all improper work or materials, upon being directed so to do by the superintendent.

But the contractor, if, after being directed, as above, to remove the same, should

[19600-9]

23

refuse or neglect so to do, shall not only suffer a deduction from the contract price of the difference, in value of proper and improper work and materials, but shall also be liable for all damages of whatsoever nature or kind, that may result from such cause. The above provisions to apply in the same way to all materials or work used, made or fixed, without the knowledge of the superintendent.

And it is hereby expressly provided, that, in case, the contractor should feel aggrieved by the decision of the superindentent, an appeal may be taken from such decision to an arbitration, chosen indifferently, and whose decision in the matter shall be final, and binding on all parties.

The owner reserves the right to alter or modify the design, and to add to or diminish from the contract price, the difference to be adjusted, as provided above.

24

The owner being bound, in all cases, to recognize the *acts* of his superintendent, not only as regards *extra work*, but also to the sufficiency of the design, the contractor being in no case responsible for any accident resulting to the work from a defective design, which fact must be determined by an arbitration of three disinterested men, chosen indifferently, and if found that the damages resulted from a want of proper care on the part of contractor, then, and in such case, the damages and loss shall be paid for and made good by him. But, if found that the accident or damage resulted from an improper design, then, and in such case, all damages shall be sustained by owners; which, in all cases, must be real, and in no case constructive damages to be allowed.

All payments made on the work during its progress are on account of the contract, and shall, in no case, be construed as an acceptance of the work executed, but the contractor shall be liable to all the conditions of the contract, until the work is accepted, as finished and completed.

24

Dimensions of the building, as represented by, and figured on the drawings:

Heights.

Basement Story, 8' (Cellar,) walk under,		to be 6' 6" feet.
Principal	do	do 13' 3" do.
Second	do	do 12' 3" do.
Third	do	do 11' 3" do.
Fourth	do	do 10' 3" do.
Fifth	do	do 15' 0" do.

25

For depth of foundation below the cellar bottoms, see sections and plans.

This building is intended to be thorough in every particular, and must be finished throughout, as hereinafter described, and anything shown by the drawings, and not hereinafter particularly reserved or described, which is necessary to complete the masons materials and work of the building is to be done at the cost of the contractor notwithstanding such omission.

GRADE OF BUILDING.

Top of first floor of joist to be fixed twenty-one inches above the new grade of sidewalk.

EXCAVATIONS.

The entire area of the proposed building, as required by plans, to be dug out to the required depth for cellar and basement bottom, by propr etors. Excavations for footings of walls, to be dug by contractor, below the first named excavation. All other excavations for drains and cisterns, and for foundations of piers, and for vault of water closets, as required by plans, to be dug by the contractor. All the excavated earth to be disposed of by the proprietors. Contractor to properly level off the earth about the walls, so as to turn the water from the walls, and re-fill the excavations for drains. After the same is put in and properly fixed, the drains will all be let into the sewer that now passes from the barn to State street. These drain pipes will be furnished, and laid by the proprietors, after the trenches are dug, and cesspools properly arranged by the person putting in the drain pipes, so as to drain each basement and cellar under the walks seperate.

26

26

RUBBLE STONE WORK.

All walls shaded blue to be of stone, of dimensions, and heights figured on the drawings and composed of good quarry stone, laid in the best manner with mortar mixed of proper proportions of best lime and clean coarse sand, the whole to be well bedded and bonded together and well faced on both sides.

Dwarf walls to have stone foundations, same kind of work as above specified between main pier, same depth and average twenty-four inches thick laid in cement mortar, all stone walls to be laid in cement mortar one foot above the basement floor, outside walls to cellars under the side-walks will be laid in cement full height

27

Footing of wall for piers on fronts from the bottom of trenches to be composed of large stone, and will be three feet high and five feet 6" wide the first course or layer must not be less than twelve inches thick by thirty feet square surface and must be well settled in the earth by a heavy instrument of wood and laid in a mortar made of two parts sand and one of water lime, upon the first stone there will be two more courses 10" to 12" each 4' x 4' and 3' x 3' thoroughly fitted together and bedded in fine mortar as above, the top of the top stone will be dressed with square edges. Piers in the cellar for partition walls 3 feet deep built of good square stones, and the top of each to be covered with a stone at least 10" thick. Bearing walls for the support of the arches and side-walks will be as shown in plans and sections. Foundations for the support of the iron columns in the cellars under walks will be composed of large stone, one stone to each layer and well fitted together.

The top of the piers for the fronts to rest the iron columns upon will be dressed and squared for staying surface.

The same kind of stone will be used for the foundations of iron columns for the interior of basement and laid in same way. All necessary holes to receive timbers and joists must be cut in the brick and stone work of old walls, by contractor for masonry. Walls of areas to be of stone, for height and thickness, see section and plan. The face of which must be laid in courses with good bonds and coarse, bush

27

hammer face. All door and window openings left where shown on plans with return stone jambs and stone caps and sills.

All proper holes left for drains and gas pipes as directed or shown by plans.

CUT STONE.

28

For the quality and kind reference will be had to the accompanying description and drawings, where the same is plainly described and shown, and must all be properly set, and after the walls are finished to be properly cleaned off and pointed up.

29

All stone piers shown on basement plan must be composed of good square blocks, well cut on all sides, medium bush-hammered with 1½ inch border, well laid in fine mortar to the right height to rest the columns upon, there will be no stone door sills. There will be a belting course of cut stone 6 inches thick laid in connection with the stone sills to the first tier of windows above the stores with a drip cut on under side, this belt course will project 2½ inches and lay in the wall at least 6 inches, and at the windows full width for sills of 8 inch jambs, under this belt of stone will be a strip of sheet lead 8" wide laid in the wall solid and furnished by the mason, projecting out for the purpose of making water tight over cornice and balcony. The stone piers dividing the store fronts on both streets will be formed in blocks thirteen inches deep into them with rustic joint, fine bush-hammered face with fine miter border, all neatly trimmed and laid up with a fine point of mortar, up to the right height for the lintel of store fronts.

BRICK WORK.

All walls shaded red on the plans are to be of bricks of the thickness and size marked on the plans, laid in the best manner, with solid heads and bed joints, and slushed solid every two courses. The cellars under the walks will be formed with 12 inch cross skin back brick arches, from which four inch brick arches will be turned and all laid in cement mortar composed of two parts sand to one of cement. The cross arches will be anchored with 1 inch round iron with nuts and washers at each

29

end. The washer on the area side will be four feet long, let into the face of the wall, size 1½ x 2½ with ¾ bolt at bottom through the wall.

The window jambs and casings outside for the last story of towers will be formed of brick and will be on all sides except the south side of south tower. There will be three of these towers one to each corner of the building.

All brick used for facing the outside walls must be hard burned, all *soft brick* to be rejected from the work. The face will be red, pressed brick, on both streets, close jointed and tuck pointed. Tower walls to extend above the roof of main building on all sides, the inner sides to each will be commenced on trusses from the ceiling of fourth story, these tower walls will be light in thick above the fourth story. Owners

30

will furnish at the time they are wanted in all cases where the roof is to be of felt and composition, a sufficient amount of 2 x 4 inch scantling to surround the whole roof of building and which must be built in the fire walls by contractor in such a manner as the lower side of the piece will be flush with the top of the roof boards. All chimneys to be built as shown by drawings, and in all cases where the flues passes through the floorings the brick work must project out 4 inches so as to form at least 8 inches between the timbers and smoke flues, all the flues to be smoothly plastered on the inside, and have stove pipe thimbles with tin stoppers, as directed, and be finished above the roof, at least one foot above the highest point. There will be brick arch window caps to all the windows of the fourth story. Seasoned lath to be worked in all the joints of the brick of the outside walls of the different stories, one to each 12th course. Contractor to execute all the masonry and furnish all the materials

31

necessary for setting bank vault in the corner room, and all necessary iron anchors and stone lining for same. Iron grating for ventilation 8 x 12 inches, to be worked in the outside walls with connecting flues to reach the basement under walks. The contractor for the masonry will set all stone and iron window caps and sills in a thorough manner.

IRON ANCHORS,

For each of the piers, and for at least every ten feet of the dead walls, to be

31

carefully worked in the masonry and secured to the timbers of each of the floors and roof. There will be 1½ by 2½ wrought iron anchors, extending on top of stone piers and let into the same on both fronts, and will extend the whole length of both fronts over openings except where oak timbers are to be put in.

The iron anchors for the fronts will be turned down into the stone one inch, and pass each other at least 6 inches, so as to prevent splitting the stone. Iron to be let in flush with top of stone.

32

These will be all pin anchors, made to wit: Pin eight inches long, of 7-8 round iron, the shank to be 24 inches long, properly welded around the pin, and will be fastened to the timber with two spikes, size of iron ½ x 1½. Those for the stone lintels of fronts to be extra heavy and must be long enough to reach the third joist from the stone or timber to be anchored. Straps of ½x1½ iron to be placed on the timbers of all the floors and roof, where the same lie upon and meet on divissior walls, these straps must be 20 inches long, American iron, and have 4 spikes each, with ends turned down into timbers. All main timbers that connect with the old wall, or every ten feet of joist must have the same kind of anchor extending through the wall, with a nut on inside of wall.

PLASTERING

All throughout the building to be of the best quality plaster of Paris finish.—All three coat work except the basement, fourth and fifth stories, which will be two coats.

All brown mortar must be composed of suitable proportions of clear, sharp sand, quick fresh lime and hair, each of which must be put on at proper proportions and times. The finishing coat must be thoroughly polished, with plumb angles and true corners.

The contractor for the masonry will be held responsible for a perfect job of plas-

32

tering, and all places that may have been damaged or bruised by carpenters or otherwise must be made good by the mason, without extra charge.

33

Finally the whole job to be fully completed in a careful, skilful and workmanlike manner, and every material to be furnished therefor, and anything shown by the plans relating to or is necessary to complete the masonry of the building, and not hereinbefore particularly reserved or described, is to be done at the cost of the contractor, notwithstanding such omission.

FINAL.

Owner to give possession of the ground on or before the 26th day of May A. D. 1856. Contractor must agree to build the walls and chimneys ready for roof on or before Sept. 1st 1856, and fully complete the plastering of the building within forty-five days after the same is declared by the Superintendent ready for lathing, and must complete the whole job of masonry within one hundred and fifty days after thefirst aboved mentioned time.

Said work in no case shall be considered as finished, unless the same is so reported to the Superintendent and accepted by him. The owner hereby agreeing to have in readiness all necessary timber and carpenter's work as they may be wanted, so that in no case the masonry shall be hindered for the want of the same, and will put on each floor of joist on all the buildings within days after the walls are made ready to receive the same and in case he should fail to do so, then and

34

in such case do hereby agree to extend the time for finishing said work in a Pro Rata proportion for such delay, and will also pay all damages resulting to the contractor from such cause of delay, provided the contractor shall at the time of such delay notify the superintendent in writing of the extent thereof, and the damages to him arising therefrom, and if required by owner must prove the same.

DAMAGES.

And in order to secure the execution of the work in the manner, and at the times specified, it is hereby distinctly declared that the damages arising from the non-ful-

34

fillment of the contract as regards time, shall be one hundred dollars per day, for each and every day the work remains unfinished and which sum of damages shall be deducted from the contract price as eliquidated damages. The object of the above is to guard against delays that can be avoided but unavoidable delays excepted.

PAYMENTS.

To be made on the work as may be hereafter agreed.

36

The Answer of the defendants is as follows.

The answer of Franklin Parmelee, Liberty Bigelow, David A. Gage and Walter S. Johnston, defendants to the petition of Joseph W. Hambleton and Daniel Goodman, petitioners in the said petition against the defendants aforesaid:

37

And the said defendants answering said petition say that they admit that on the 27th day of May A. D. 1856, they were possessed of said parcel of land described in said petition, as assignees of certain leases before then made by the owners thereof, to divers persons other than these defendents, which leases have a long period of time yet to run; but that on or about the 15th day of September A. D. 1856 these defendants, by their deed bearing that date onveyed all their interest in and to said premises to one Daniel Lawrence of the city of Boston, who is still the legal owner of said leasehold estate, which said deed on about the 16th day of October 1856, was duly recorded in the Recorder's office of said county of Cook, as by the said deed when produced will more fully appear.

And the said defendants further answering say that on or about the 27th day of May aforesaid, they entered into a contract with the said petitioners substantially the same with the specifications as set forth in said petition.

37 The said defendants also say that said] contract was made respecting the said lands and premises described in said petition.

38 And the said defendants further say that they deny that the said complainants did all the work and furnished all the materials to be by them done and furnished according to the provisions of said contract and they deny that the said petitioners were prevented by causes of delay which were unavoidable on their part from completing the said work or the several parts thereof within the time specified in such contract, and they also deny that the said delay in finishing said work and fulfilling said contract was occasioned by the defendants, or that they were prevented from completing the same by the defendants neglect to furnish any of the materials provided in and by the said contract or otherwise to be furnished by them. And the said defendants allege that the delay of the said petitioners, instead or being occasioned by the default of the defendants in the premises, was in fact occasioned by the omission of the petitioners to prosecute the said work when the weather was suitable and by a bad and improper arrangement of said work, by their sub-letting different portions thereof, to different persons one portion to one man and another portion to another man, and thus requiring the defendants to bring forward the other work, which was not to be done by the petitioners, all at the same time and in a manner which it was not contemplated or agreed that they should do.

39 The defendants deny that the said petitioners have been put to great expense, or any expense (except that which was mentioned in said petition as amounting to eighty-six dollars and sixty-two-cents, which defendants paid or that they have sustained any loss or damage by reason of any default or omission of the defendants to perform their part of said contract and that all the delays in said work, (except that above mentioned) on the part of said petitioners or their sub-contractors, were their own fault in the arrangement of said work and the want of proper care, arrangement and diligence in prosecuting the same.

And they further say that the said petitioners did not notify the said Boyington, Wheelock or assistant, at the time of any alledged delay or the damages consequent thereupon, nor did they notify the defendants to the best of their knowledge, infor-

[19626-10]

39

mation and belief, or either of them, of the same, except as to that above mentioned. And the said defendants deny that they delayed the said Ford or prevented him, or any other of the sub-contractors on said work from completing their contract.

40

And the said defendants further say that the said petitioners failed to complete their said contract, and that the said building was so far unfinished in respect to the said work to be done and performed by the said petioners and therefore unfit to be used for the period of more than sixty days after the time appointed and fixed in said contract for the completion thereof, and they say that the rents of said building if finished would have amounted to the sum of fifteen hundred dollars per month for said time, and it is provided in and by said contract and that the said petitioners should pay the defendants one hundred dollars per day for each and every day the said work remained unfinished after the time specified in said contract, which should be deducted from the contract price as liquidated damages (unavoidable delays being excepted) and they further say that such delay was not unavoidable, and they shall insist on the said sum of one hundred dollars per day for said time, as the damages sustained as aforesaid, and which was due and owing by petitioners at the commencement of this suit and it is still due and owing as a legal proper offset to the claim of the said petitioners and which they hereby offer to allow and have deducted from any sum which the said petitioners may prove on the trial, of this suit against these defendants. And the said defendants further answering admit that the said complainant caused to be served upon them the notice mentioned in said petition whereby they objected to so much of said certificate of Wm. W. Boyington as related to the non-fulfilment of said contract as respects time, and an allowance of two thousand dollars as damages for such non-fulfillment, and to so much of said certificate as related to the brick and side walk substantially as stated in said petition,

41

And these defendants having fears that the persons proposed as arbitrators in said notice would have an undue partiality towards the complainants, from the fact that said persons were. as these defendants were informed and believed to be true engaged in the same occupation as that of the complainants, and therefore would be liable to lean strongly against these defendants, did take the liberty to interpose an objection to them, and to suggest other names and persons as they believed more suitable to decide such a controversy impartially.

41

And with that view these defendants within the time required in said notice, sent to complainants' solicitors the following communication.

Chicago, March 16th, 1857.

GOODRICH, FARWELL AND SMITH, Esq'rs.

GENTLEMEN:

In pursuance of a notice from Hambleton & Goodman, of a wish on their part to arbitrate the differences which have arisen between them and us, respecting the work on "Garret Block," and wishing ourselves to avoid litigation, and to arbitrate our differences, providing we can agree on the arbitrators, and the terms of submission, we say that we have made inquiries concerning the men named by Messrs. Hambleton & Goodman in their notice bearing date March 11th inst, and although they are very reputable gentlemen, yet the fact that they are all engaged in the same business with Messrs. Hambleton & Goodman is sufficient, we think, to give them an undue bias in their favor and we therefore feel unwilling to accept either of them, and to avoid the bias which naturally arises from similarity of occupation as in the persons named, we name Cyrus Beers, William R. Loomis and James L. Howe, as arbitrators, or as names to choose from, and desire that you inform us within a reasonable time whether Messrs. Hambleton & Goodman will accept these or either of them, to form the arbitrators between us, which arbitrators ought not to be less than three in number, all of which ought to be chosen by the parties.

42

Yours Respectfully,

F. PARMELEE & CO.

And these Defendants further say that the complainants or their said solicitors objected to all the persons so named by the said deff'ts, except the said Cyrus Beers, whom they accepted, that after considerable negotiation these arbitrators were agreed upon by the parties but on being notified of such selection, two of them as these defendants are informed, and verily believe to be true, being the said Beers and Mr. Francis Sherman refused to serve and the defendant Parmelee on being so informed and believing that it would be extremely difficult if not impossible to obtain the services of three such gentlemen of experience, ability and integrity, as the importance of the differences between the parties required, went to the complain-

43

43

ant's solicitor who had charge of the matter, and informed him of such conclusion, and stated that he believed it would be better for all concerned to leave these matters to the decision of twelve men than to try any more to have it done by arbitrators, to which the said solicitors also assented. But nothing more was done in that behalf.

And these defendants further say, that according to the best of their knowledge and belief, it is not true, as stated in said petition; that the damage resulting from the failure of said brick arch side walks, was occasioned by a defective design of said work, but the same was the result of the negligence of the petitioners in not building the same in the proper season of the year, and in proper and suitable weather, and in a proper manner; that they were frequently requested during the fair weather, and proper season to do said work, but persisted in leaving the same till the season became wet and cold, and wholly unsuited to such work, and by reasson theeof the work failed. That the design of said work, as they are informed and believe, has been much followed' and when the work is well done, has alwas proved sufficient and successful.

44

And the said defendants say that they kept and performed the said contract on their part, except as to said short detention of a very few days and for that they settled with and paid the complainants, but that the complainants have not performed said contract on their part but failed so to do and have thereby for the period of more than sixty days without any cause of prevention by these defendants or unavoidable accidents or delays, deprived these defendants of the use of said building and occasional damages to these defendants to a much larger sum than can or ought justly to be claimed upon said contract on their part. Without this that any other matter or thing not hereinbefore confessed or avoided, traversed or denied, is true to the best of their knowledge or belief, and they pray that they may be hence dismissed with their costs, expenses &c.

FRANKLIN PARMELEE,
LIBERTY BIGELOW,
DAVID A. GAGE,
WALTER S. JOHNSON.

WM. K. McALLISTER *Solicitors for Defendants.*

Replication was filed in the usual form.

57

The bill of exceptions was entitled in the cause in said Court of Common Pleas and is as follows, viz.:

Be it remembered that on the 30th day of November, A. D., 1857, that being one of the days of the November term of the said court. the said defendants filed with their clerk of said court an affidavit for a continuance of said cause, and thereupon by their attorneys moved the said court that the said cause be continued which said affidavit is in the words and figures following, to wit.

FRANK PARMELEE, LIBERTY BIGELOW, DAVID A. GAGE, ET AL. ads. JOSEPH W. HAMBLETON & DANIEL GOODMAN.	Cook County Court of Common Pleas. MECHANICS' LIEN.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

58

Frank Parmelee one of the defendants in the above entitled cause, being duly sworn deposes and says that the said defendants, have fully and fairly stated their case in this cause, to W. K. McAllister of the city of Chicago, their counsel therein, and that they have a good and substantial defense on the merits in this cause, as they are advised by their said counsel after such statement, and which the said defendants verily believe to be true.

And he further says that John Whitney who resides in the city of Chicago and Harmon Lanckton, who is now residing in Bainbridge, Granger Co., Ohio, are each of them necessary and material witnesses for the defendants on the trial of this cause, without whose testimony and that of each of them the said defendants cannot safely proceed to the trial of the same.

And deponent further says that the said witnesses are each of them mechanics and that they are competent, credible and intelligent persons, and that he expects that

58

the defendants will be able to prove by the said John Whitney, on the trial of this cause, that he the said Whitney saw the progress of the work done under the contract of the petitioners set out in their petition in this cause, nearly every day with some slight exceptions from the commencement of the said petitioners with their said job until they quit the same. And that from the commencement aforesaid to the

59

time fixed in said contract for the completion of said job by the petitioners there were materials and work always in readiness for the use of petitioners in their said job, sufficient to have enabled them by procuring reasonable and adequate supply of laborers, and by prosecuting said work with proper dilligence to have completed said job within the time fixed in said contract for the completion thereof. And that this deponent in the month of August, A. D., 1856, at the place of said work requested and urged the petitioners to procure more help so as to complete said job within said time, stating to them that their money was ready to pay them as fast as needed if they would do so, and more particularly that deponent urged and requested them to proceed at that time and make the brick arches under the side-walks upon State and Randolph streets, to support the flagging in front of said building on said streets as provided by the contract, to which contract (as set forth in the said petition, deponent refers as a part of this affidavit,) and he expects to be able to prove by said Whitney, that the said petitioners during the greater part of the time of doing said work had an insufficient supply of men for said work and that they neg-

60

lected to prosecute the same with diligence and fidelity, and that they wholly omitted and neglected (though requested to do the same at the proper time by deponent,) to commence the building of said arches, and work under the side-walks until late in the fall, when the season was cold and wet and that the same in part fell in, for that reason and for want of proper construction soon after they were built by petitioners. And that the said job of the petitioners for and during the period of about wo months after the time fixed for the completion thereof, was so far unfinished as to render said building entirely untenantable during that time and that the defendants sustained heavy damages by losing the use of said buildings during such time as aforesaid. And he further expects to be able to prove by said Whitney that such delay as aforesaid, in completing said job, was not the result of any unavoid-

61

able accident, nor of the default of the defendants in furnishing the materials required to be furnished by them or otherwise, but was the result of a want of diligence and fidelity on the part of petitioners, in the prosecution of the same, and furnishing the requisite number of laborers. And he further says that he expects to be able to prove by the said Lanekton, on the trial of this cause, that the witness worked upon the said brick arches, during their construction, under the direction of

61

the petitioners. And that the weather was cold enough at the time of said work to freeze the mortar and that instead of making the mortar rich and using a small quantity of it and putting the bricks in the arches aforesaid, close together, a large and improper amount of mortar was used, which on thawing necessarily gave away and displaced the bricks, and thus weakened the arches, for the reason of such use of mortar and the coldness of the weather and by the occurrence of a thaw, fell in, and also that said witness has worked at the masons trade for a great many years and has known many arches built upon the plan of these in question, and that if properly constructed, they are good and durable arches.

62

And deponent further says that on the twenty-fifth day of November inst., he caused the said John Whitney to be duly served with a subpoena in the cause issued by the clerk and under the seal of said court, requiring his appearance, (among others named therein,) in said court, on the 30th day of November inst., the day set for the trial of said cause, to testify on the part of the defendants. And he further says that the said John Whitney since the service of the subpoena on him as aforesaid, and on the 6 o'clock train, in the morning on the 26th day of November inst., without the permission, privity, or consent of the said defendants or either of them, left the city of Chicago to go to Rochester in the State of New York, to be absent for the period of about three weeks. That the said Whitney has and is interested in a large claim against the Detroit and Milwaukee Railroad Company, amounting as deponent is informed and believes to be true, to fifteen hundred dollars, which is past due and which said Whitney greatly feared he should lose. That during last week he received a communication from the agent of said Company. That if the said Whitney would be in Detroit on the 30th of November inst., the said claim would be settled and paid.

That said Whitney also had the settlement of a Railroad contract to build portions of a road in Canada in connection with one Orson Touslay, Charles Harrington and Everhed, which required his presence at the city of Rochester, New York, the middle of the present week by appointments by his co-contractors, as deponent is informed and believes to be true, and that his interest in said matters would greatly suffer unless he went there as required and he would unless personally present in all probability lose said debt $1,500.

63

And deponent further says the said Harmon Lanckton was at the time he so worked on the said arches as aforesaid, in the employ and under an engagement with one B. C. Howard, a master builder in Chicago, and was permitted to work on said arches under the direction of said petitioners for their accommodation, and on account of some neighborly dealings between said Howard and petitioners, but was paid for the said work, by the said Howard, which facts were until the 25th of November inst., wholly unknown to the said defendants or either of them.

That neither of the defendants had any acquaintance with the said Lanckton or until the 28th inst, knew his name. That deponent has endeavored in order to prepare for the trial of this cause, to ascertain the facts concerning the same, and the names of persons employed, by enquiring of the different employees of the petitioners, but has been unable from the prejudice or unwillingness of such employees to obtain any information solicited, and on the 25th November inst., while causing the witnesses in this case to be subpœned he acidentally and for the first ascertained the facts aforesaid, which he could prove by the said Lanckton, and immediately applied to the said Howard, for the name and residence of the said witness; but the said Howard had forgotten his christian name, and was unable to find out the same. And when the said Lanckton had gone to using every reasonable effort by looking over papers and making inquiries until the 28th inst., when for the first time deponent ascertained the name and residence of the said witness, and that he had left Chicago about six weeks ago for Bainbridge, aforesaid, to remain there during a month or two of the coming winter, and then return to Chicago. Doponent further says that said witness, as he has learned since ascertaining his name, is about 50 years of age, and a very candid, intelligent mason by trade, of a long and extensive experience in the different branches of his said trade in eastern cities. And at the time of working on the said arches as aforesaid, he was not in the employment of either of the parties to this suit, and is therefore a reliable witness, and that defendants do not know of any witness by whom they can so fully and satisfactorily prove the said facts as the said Whitney and the said Lanckton.

64

65

And deponent further says that this application for a continuance of said cause is made in good faith, and for the mere and sole purpose of securing to the defendants in this cause, on the trial thereof, their rights in the premises. And he fur-

65

ther says, that he has no doubt but that the defendants can obtain the testimony, and the attendance of said witnesses for the trial of this cause, at the next term of this court.

FRANK PARMELEE.

Sworn this 30th day of November, A. D., 1857, before me John Forsyth, Notary Public.

The counsel for the petitioners, in opposition to such motion, called the attention of the court to certain statements contained in the deposition of Patrick Kerlihan, a witness on the part of the petitioners, which deposition had been taken on the 19th day of October, A. D., 1857, by the consent of counsel, and was then on file. The following Interrogatories had been put to the witness, viz:

Have you, within the last few days, had any conversation with the defendant, Frank Parmelee, with reference to the claim of Hambleton & Goodman, against him'? If so, state when, and where such conversations took place, and what was said by either of you, on the subject ?

To which he answered as follows:

66

Yes, I have. The conversation was last Saturday morning, on the corner of State and Randolph streets. I asked him when the trial of Mr. Hambleton was coming off. He answered, that perhaps next month, but probably not until spring. I asked him if he meant to put the trial back. He said "If I possibly can." I think this is what he said, according to the best of my opinion. I was just leaving.

To the reading of which, on the hearing of said motion, the defendants, by their counsel, then and there objected, which objection was overruled by the court and the said answer was read on the hearing of said motion, to which ruling of the court, the defendants, by their counsel, then and there excepted. And the counsel of the petitioners also stated to the court, and the counsel for defendant admitted John Whitney, one of the persons named in the foregoing affidavit of Parmelee, was father-in-law of said Parmelee.

66

And the said court then and there denied the said application for a continuance of said cause. And the defendants, by their counsel, to said denial thereof by the court, then and there excepted.

67

That on the 3d day of December, A. D., 1857, said cause came on to be tried before the said court and a jury, and thereupon, the said petitioners, for the purpose of sustaining the issues in said cause, on their part, offered in evidence the contract between the said petitioners, and the said defendants referred to in said petition, and a copy of which is thereto attached.

68

And for the purpose of further sustaining the issues in said cause on their part, the said petitioners, by witnesses, introduced and sworn on said trial, gave evidence showing that they took possession of the ground described in said petition and contract, and commenced the excavations for foundation walls of the buildings to be erected thereon by them, on or about the 27th day of May, A. D., 1856, and that they were engaged in and about the erection and completion of said building from that time up to and until the 20th day of February, A. D., 1857. Said petitioners offered further evidence, tending to show that they were delayed in the prosecution of their work upon said building in the months of August, September and October, 1856, or want of timber, lintels, and the cast iron window caps and window sills, stone sills for one of the towers. That these materials were furnished by the defendants, but were not furnished in due and proper season, as they were required. And that the defendants paid the plaintiffs the sum of $86 62, being the wages of the men who remained idle while waiting for the iron caps and sills, as mentioned in the petition. That said delays occurred at different times during the months aforesaid, and that in consequence thereof, the petitioners could not employ, to good advantage, so many men upon said building as they otherwise might have done; and could not proceed with the work any more rapidly than they did. Further evidence was given on the part of the petitioners, tending to show that they commenced the laying of the front walls of the building on State and Randolph streets, on the 11th day of August 1856; that for the purpose of laying the outside tier of brick, a scaffold was necessarily used, resting upon upright poles, four or five feet distant from the wall, and that said front walls were finished and the scaffoldings removed on or about the first day of November, 1856. That in the month of October, A. D., 1856, the petitioners, at

68

69

the request of the said defendants, commenced the excavations under the side walks, on State and Randolph streets, and were getting ready to build the brick arches for the vaults which were to be constructed beneath the side walks, and on a level with the basement story or cellar of the building, and intended for the use of the building. That the masonry of said vaults was built up to and connected the front walls of said building on State and Randolph streets, and extended out from said walls sixteen or eighteen feet. That the petitioners having built all the side walls of the vaults, and the supports for the arches, commenced the construction of said arches on or about the 5th day of November, 1856, and in the course of three or four days had put up all of said arches on State street, and a few upon Randolph street, and the defendants had begun to place upon the arches, the flagging stone for a side walk, when the arches commenced falling in, and very soon all the arches on State street, and all but two or three on Randolph street had given way and fallen. And at the request of the superintendent, the remaining arches were taken down, and the brick of the arches that had fallen were removed by the said petitioner, and no more arches were built, but in place of the brick arches and flagging stone, the defendants afterwards constructed a plank sidewalk around the building.

Petitioners further offered evidence intending to show that the plan of the arches intended to support the side walks was defective, and that they fell because of the defects of the plan.

70

Petitioners introduced further evidence tending to show that they were delayed in the completion of the plastering of said building by the cold weather, and in procuring stoves for heating the rooms in which the plastering was to be done and for want of some cut stone work for door sills which were to be furnished by the defendants and without which the building could not be completely enclosed. That the roof could not be put on until the front walls were up. And that the inside work could not be done until the roof was on. That after the roof was on the petitioners followed up the carpenters without delay and finished the inside work as soon as practicable.

70

The petitioners also introduced in evidence the certificate of the architect, Wm. W. Boyington, referred to in the petition, and a copy of which is therein contained and also gave evidence showing the truth of the statement in the petition, as to the interest and title of the defendants in and to the premises, and showing that the defendants were in possession the premises as described and mentioned in the petition.

71

The petitioners further gave evidence tending to show the amount and value of extra work done by them and in connection with said job, and mentioned by them in their said petition in this cause.

The petitioners also offered to give evidence to show that they had sustained the special damages mentioned in the petition, but the defendant's counsel objected to such evidence on the ground that if such damages were in fact sustained, they could not be allowed in this proceeding, and that there could not be any lien upon the premises for such damages, which objection was sustained by the court and the petitioners were not allowed to give any evidence as to such alledged damages.

In every instance where the petitioners gave evidence to substantiate the allegations as above stated, such evidence consisted of the testimony of at least two witnesses.

72

The defendants for the purpose of sustaining the issues in said cause on their part thereupon by witnesses introduced and sworn gave testimony tending to show that the petitioners did not prosecute their work on said building diligently, particularly in the early part of the season, and that they consumed a disproportionately large part of the season in the construction of the foundation and partition walls. That they were not delayed to any considerable extent for want of the iron and cut stone work, and that if they had prosecuted the work diligently and vigorously after the last of the iron and cut stone was on the ground, they might have finished their

92 portion of the work on said building by the first day of December A. D. 1856, when in fact they did not finish the plastering of the building until about the 20th day of February 1857.

The defendants further offered evidence tending to show that it was not necessary to have outside scaffolding in the putting up of the front walls, and that said walls might have been laid up from the inside and that the petitioners might have commenced their work upon the arches for the side walk much earlier in the season than they did and have finished them during warm weather of the Summer or Autumn.

73 That when they commenced building said arches the weather was cold. so that the mortar froze between the bricks. That the season was very unfavorable for the construction of such arches and that the petitioners had notice from the Superintendent of the building not to build the arches at that time and that in going on with them at that time they assumed the responsibility of making them stand.— That the arches were not properly built by the petitioners according to the plan and that they were so informed by the Superintendent soon after they commenced building them.

That the plan of the arches was a good one and suitable for the purpose intended and if properly built so as to carry out the plan, they are strong and firm. That other arches built upon the same plan and properly constructed have stood firm for years without any indication of settling or giving way. That in warm weather is the proper time to build such arches.

The defendants further gave evidence showing that they had paid to the said petitioners for work done and materials furnished by them on said building the sum of fifteen thousand eight hundred and eighty-five dollars.

73

It further appeared from the evidence introduced by the defendants, that the excavations for the brick arches, and the arches constructed in said excavations were made and constructed outside of the line of the lot described in the petition and in the public streets of the city of Chicago.

74

1. The plaintiffs council thereupon asked the court to instruct the jury as follows:

The Plaintiffs are not to be charged with delay in doing their work, if such delay was caused by the defendants or was owing to the want of materials, which the defendants were to furnish.

2. The plaintiffs are not responsible for the failure of the arches, if such failure was owing to a defective design.

3. There is no issue made by the pleadings as to the *location* or *description* of the premises upon which the work was to be done. If the jury believe from the evidence that the work was done upon the premises mentioned in the petition, then the plaintiffs have a lien upon the premises if anything is due them for such work.

4. If the jury find anything due the plaintiffs they will allow interest at the rate of six per cent per annum, from March 9th, 1857.

Which said instructions so asked for by the council for the said petitioners were given by the court and to the giving of said instructions, and each of them separately by the court the defendants by their counsel than and there excepted.

75

The counsel for the defendants then asked the court to instruct the jury on the part of said defendants as follows, to wit.:

1. If the jury find from the evidence that the brick arches in question, and the excavations in which they were placed were made within the street or streets of the city of Chicago, and were not in fact upon the lot or land described in the petition in this cause, the jury will as to all items claimed by the plaintiffs for that work find for the defendants.

2. That if the jury find that the claim of the plaintiffs in this cause, includes a portion of work done and performed within the streets of the city of Chicago and not upon the lot or land described in the petition, which said work so done off from said lot or land together with that which was done on said lot or land, was performed under one and the same contract, and the contract in evidence, the claim for the whole work is not divisible, or to be apportioned, and the plaintiffs having no lien for the work done within the streets and not upon the land described, cannot by reason of the indivisibility of the demand have a lien for any part of the same.

75-6

3. That under the contract and specifications between the parties, and read in evidence, the plaintiffs are themselves bound to furnish all the stone and iron window caps and sills and also the cut stone to be used in doing the work on the building under said contract and specifications. And if the jury shall believe that there was any delay of said work on account of said materials or any of them not being furnished at the time they were wanted by plaintiff on said job, such delay is no legal excuse for the plaintiff in not completing said job within the time specified in said contract for such completion, and they will find for the defendants.

76

4. That the parties in this case have fixed on a certain mode by which the amount to be paid under the contract in question shall be ascertained, and having done so, the party seeking an enforcement of the agreement must show that he has

done everything on his part to carry it into effect, and he cannot compel the payment of the amount claimed unless he procure the kind of evidence required by the contract or show that by time or accident he is unable to do so. And if the jury find that a certificate of the amount due has been given by the architect, the plaintiffs cannot take part of it as evidence of extra work done, and reject the other parts of it, but the same must be taken together in all its parts as to amounts, if one part is taken.

5. If the Jury find from the evidence that the plaintiffs failed to make the brick arches in question in accordance with the contract and specifications between the parties respecting them, or if the architect of said work gave them directions as to the manner of doing said work, and the plaintiffs failed to comply with such directions, or if they performed said work in an unskillful, unworkmanlike and improper manner, then the plaintiffs have failed to complete their said contract, and cannot recover in this suit, whether the design for such arches was good and sufficient, or not."

Of which said instructions the first, second, third and fourth were refused, and the last was given by the court. And to the ruling and decision of the court, in refusing said first, second, third, fourth instructions, and each of them, so asked for by the said defendants, as aforesaid, the defendants, by their counsel, then and there excepted, and the jury having retired, to consider of their verdict, returned into court with the following verdict, to wit:

We, the jury, find a verdict for the plaintiffs to the amount of Four Thousand Nine Hundred and Seventy-two and 28-100 Dollars.

R. S. Hicks, Foreman, which said verdict included the unpaid balance of the contract price, the amount of the extra work, and interest on the same from the 9th day of March, A. D., 1857. And the said defendants, by their counsel, then and there moved the court to set aside the verdict of the Jury, and to grant to the said defendants a new trial, which motion was overruled by the court. To which decision of the court, in overruling said motion, the defendants, by their counsel, then and there excepted, and prayed an appeal to the Supreme Court, and that this bill of exceptions might be sealed by the Court, which is accordingly done.

JOHN M. WILSON. {SEAL.}

213 = 94

Parmelee

v

Hamilton & [illegible]

Filed April [illegible]

[illegible]

Clerk

STATE OF ILLINOIS—SUPREME COURT.

FRANK PARMELEE, LIBERTY BIGELOW, DAVID A. GAGE and WALTER S. JOHNSON *vs.* JOSEPH W. HAMBLETON and DANIEL GOODMAN.	*Points for Appellants.*

I.

The affidavit filed by appellants for a continuance, was in compliance with the statute, and the court erred in overruling their motion therefor.

Wade vs. Halligan, 16 *Ill.*, 507.
1 *Gil.*, 260. 1 *Scam.*, 528.
2 *Scam.*, 73. *Id.* 218.

II.

The court erred in hearing evidence in opposition to the motion for a continuance.

1st. Because it has been the practice of the courts to regard the application as ex parte, and to be determined solely upon the affidavit and the pleadings in the cause.

2nd. It cannot be discretionary with the court to hear opposing testimony in such cases as he deems proper; for if it is, no exception would lie in such cases, and the right to take exceptions is made general by the statute, in all cases.

3d. If the court can, legally, receive opposing evidence, he is bound to receive it whenever offered, and as much of it as may be offered, which would lead to consequences of the most objectionable character.

Hanford vs. McNair, 2 *Wend. R.* 286.

III.

On the part of the plaintiffs below, the Court gave the jury the following instruction:

"That if they find any thing due the plaintiffs, they will allow interest at the rate of six per cent per annum, from March 9th, 1857."

The plaintiffs claimed a balance due upon a written contract, and also the sum of $500.00 for work done extra of the contract, and was all done during the year 1856, and before the 20th of February, 1857.

This claim for extra work, &c., as respects interest, comes under the old statute of 1845, because the new statute was approved January 31st, 1857, and would not go into operation till 60 days after that. *See Sess. Laws* 1857—*page* 45.

The instruction was therefore erroneous, because it is not based upon any of the conditions, provided in sec. 2 of the interest laws of 1845.

M Lean v Thorpe 4 Mo R 256

If it is claimed that the amount was liquidated, we say that we deny the fact. And the Court did not base his instruction upon any such ground.

Hitt vs. Allen 13 *Ill.* 596.

IV.

The first instruction asked by the defendants below, was correct and should have been given by the Court.

1st, Because the statute of liens, does not give a lien for work done in the streets and not upon the lot upon which the building is erected.

The first sec. is thus: "Any person who shall by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting or repairing any *building*, or the *appurtenances* of any building *on such land or lot* shall have a lien upon the whole tract of land or town lot," &c.

If the word "appurtenances" had not been used in the section at all, it is quite clear that there would be no lien given for work done in the street—such as the arches and flagging for sidewalk.

The statute of New York was limited to the city, and therefore intended for city purposes only. It provided that there should be a lien for work materials, &c., furnished *towards the erection, construction* or *finishing* of any building." Yet the Court of Appeals held that flagging the sidewalk and work on the yards and areas were not within that statute.

McDermott vs. Palmer, 4 *Selden R* 383.

It will be seen that the introduction of the word "appurtenances" into our statute is under a limitation.

The phrase "*on such land or lot*" qualifies the first antecedent *building* and must necessarily the last antecedent, "*the appurtenances of any building.*" This is the grammatical construction of the section, and is without doubt within the intention of the legislature.

5 *Hill* (*N. Y.*) *R.* 410.

But the petition in this case contains no allusion to any appurtenances. It alleges that defendants were in possession of certain premises and bounds them on their north by Randolph street, on the west by State street, &c., and avers that work in question was done on the premises so described, which allegation is not admitted by the answer. Now if the plaintiffs could, under that statute and that petition, have a lien for excavations, arches, and flagging done within the streets mentioned, they could with equal propriety have a lien on the lot and building for grading and paving the same streets; which nobody will deny to be palpably absurd.

V.

In connection with the foregoing point, the appellants object to the decree in the case, as being broader than the petition.

If the word "appurtenances" will include the work done outside of the lot described and in the street, then the decree is erroneous, and should be reversed; because it decrees a lien on the premises described in the petition, "and the appurtenances."

The petition does not claim any lien upon the "appurtenances," nor does it refer in any manner to them, but is confined to premises bounded by the streets.

The second instruction asked by the defendants below should have been given.

That instruction was to the effect that the written contract, given in evidence, for the doing certain work for a gross sum, was entire, and not apportionable; and that if the jury found that the same contract included work to be done in the streets of the city, and not upon the premises described, the petitioners, as to the last mentioned work, done in the streets, would have no lien on the lot described, and therefore, by reason of the indivisible nature of the contract, could have no lien for any of said work.

1st. It is undoubtedly true that the contract referred to in the instruction was entire, and not apportionable as to the remedy.

Crosby vs. Loup, 14 *Ill.*, 330.

2d. Suppose that contract had included a large job of grading and paving the streets, with a small job of masonry on the building in question for one entire gross sum: would the building and lot, therefore, be subject to exhaustion, from other mechanics, for the work, &c., done in grading and paving the streets?

If a lien is to be enforced in such a case, courts have to do one thing, which is impracticable, or another that is unjust. First, the contract, which is made entire and indivisible by the parties, must be divided and apportioned by the court; or, secondly, they must allow the petitioner to do indirectly what he cannot do directly, viz, have a lien for labor and materials not done upon or furnished for any building, or the appurtenances of any building. They must allow a lien for work which does not benefit the lot or building in question, and do injustice and work a fraud upon others furnishing labor and materials for the same, on the faith that others have a lien only to the extent of the labor and materials *visibly* furnished for the building itself; and also the effect might be to collect a debt due only from one person, from the estate of another.

The only practicable rule, in such case, seems to be, that if an entire contract includes work for which a party would, if the same was done separately, have no lien, with work or materials for which, if separately furnished, he would have a lien, instead of enforcing the non-lien claim with the other, he shall be held to waive the claim altogether.

Johnson vs. Pike, 35 *Maine*, 291.
Lumbard vs. Pike, 33 *id.*, 141.
Bicknell vs. Trickey et al, 34 *id.*, 273.

VI.

The court erred in refusing the third instruction on the part of the defendant below, asking for a construction of the contract. It is peculiarly the province of the court to construe a contract, when given in evidence.

~~R. K. McALLISTER,~~
~~*Counsel for Appellants.*~~

VIII

The court erred in giving the third instruction on the part of Appellee.

The claim of Appe. was in part for extra work done upon request, of the value of $300 (See Abstract page 4) There is no admission or denial in the answer as to the extra work

It was therefore necessary to prove that this work was done on the premises described, and upon the request of the defts.

De Wolf vs Long 2 Gil 679.

Now the instruction makes the mere doing the work on the defts premises, sufficient to create a lien,

Work done on the premises of another, however meritorious, it may be, is not sufficient without a request, to furnish ground for an action at common law

Bartholomew vs Jackson 20 Johnson 28

And much less does such unrequested labor give a lien under the Statute of Liens

The 2 instruction should have been based upon the hypothesis of a request or some express contract,

213

[illegible] et al

v

[illegible] et al

Brief

STATE OF ILLINOIS—SUPREME COURT.

FRANK PARMELEE,
LIBERTY BIGELOW,
DAVID A. GAGE and
WALTER S. JOHNSON
vs.
JOSEPH W. HAMBLETON and
DANIEL GOODMAN.

Points for Appellants.

I.

The affidavit filed by appellants for a continuance, was in compliance with the statute, and the court erred in overruling their motion therefor.

Wade vs. Halligan, 16 *Ill.*, 507.
1 *Gil.*, 260. 1 *Scam.*, 528.
2 *Scam.*, 73. *Id.* 218.

II.

The court erred in hearing evidence in opposition to the motion for a continuance.

1st. Because it has been the practice of the courts to regard the application as ex parte, and to be determined solely upon the affidavit and the pleadings in the cause.

2nd. It cannot be discretionary with the court to hear opposing testimony in such cases as he deems proper; for if it is, no exception would lie in such cases, and the right to take exceptions is made general by the statute, in all cases.

3d. If the court can, legally, receive opposing evidence, he is bound to receive it whenever offered, and as much of it as may be offered, which would lead to consequences of the most objectionable character.

Hanford vs. McNair, 2 *Wend. R.* 286.

III.

On the part of the plaintiffs below, the Court gave the jury the following instruction:

"That if they find any thing due the plaintiffs, they will allow interest at the rate of six per cent per annum, from March 9th, 1857."

The plaintiffs claimed a balance due upon a written contract, and also the sum of $500.00 for work done extra of the contract, and was all done during the year 1856, and before the 20th of February, 1857.

This claim for extra work, &c., as respects interest, comes under the old statute of 1845, because the new statute was approved January 31st, 1857, and would not go into operation till 60 days after that. *Sec Sess. Laws* 1857—*page* 45.

The instruction was therefore erroneous, because it is not based upon any of the conditions, provided in sec. 2 of the interest laws of 1845.

[illegible] McLean v Sharpe 4 Mo. 256

If it is claimed that the amount was liquidated, we say that we deny the fact. And the Court did not base his instruction upon any such ground.

Hitt vs. Allen 13 *Ill.* 596.

IV.

The first instruction asked by the defendants below, was correct and should have been given by the Court.

1st, Because the statute of liens, does not give a lien for work done in the streets and not upon the lot upon which the building is erected.

The first sec. is thus: "Any person who shall by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting or repairing any *building*, or the *appurtenances* of any building *on such land or lot* shall have a lien upon the whole tract of land or town lot," &c.

If the word "appurtenances" had not been used in the section at all, it is quite clear that there would be no lien given for work done in the street—such as the arches and flagging for sidewalk.

The statute of New York was limited to the city, and therefore intended for city purposes only. It provided that there should be a lien for work materials, &c., furnished *towards the erection, construction* or *finishing* of any building." Yet the Court of Appeals held that flagging the sidewalk and work on the yards and areas were not within that statute.

McDermott vs. Palmer, 4 *Selden R* 383.

It will be seen that the introduction of the word "appurtenances" into our statute is under a limitation.

The phrase "*on such land or lot*" qualifies the first antecedent *building* and must necessarily the last antecedent, "*the appurtenances of any building.*" This is the grammatical construction of the section, and is without doubt within the intention of the legislature.

5 *Hill* (*N. Y.*) *R.* 410.

But the petition in this case contains no allusion to any appurtenances. It alleges that defendants were in possession of certain premises and bounds them on their north by Randolph street, on the west by State street, &c., and avers that work in question was done on the premises so described, which allegation is not admitted by the answer. Now if the plaintiffs could, under that statute and that petition, have a lien for excavations, arches, and flagging done within the streets mentioned, they could with equal propriety have a lien on the lot and building for grading and paving the same streets; which nobody will deny to be palpably absurd.

V.

In connection with the foregoing point, the appellants object to the decree in the case, as being broader than the petition.

If the word "appurtenances" will include the work done outside of the lot described and in the street, then the decree is erroneous, and should be reversed; because it decrees a lien on the premises described in the petition, "and the appurtenances."

The petition does not claim any lien upon the "appurtenances," nor does it refer in any manner to them, but is confined to premises bounded by the streets.

The second instruction asked by the defendants below should have been given.

That instruction was to the effect that the written contract, given in evidence, for the doing certain work for a gross sum, was entire, and not apportionable; and that if the jury found that the same contract included work to be done in the streets of the city, and not upon the premises described, the petitioners, as to the last mentioned work, done in the streets, would have no lien on the lot described, and therefore, by reason of the indivisible nature of the contract, could have no lien for any of said work.

1st. It is undoubtedly true that the contract referred to in the instruction was entire, and not apportionable as to the remedy.

Crosby vs. Loup, 14 *Ill.*, 330.

2d. Suppose that contract had included a large job of grading and paving the streets, with a small job of masonry on the building in question for one entire gross sum: would the building and lot, therefore, be subject to exhaustion, from other mechanics, for the work, &c., done in grading and paving the streets?

If a lien is to be enforced in such a case, courts have to do one thing, which is impracticable, or another that is unjust. First, the contract, which is made entire and indivisible by the parties, must be divided and apportioned by the court; or, secondly, they must allow the petitioner to do indirectly what he cannot do directly, viz, have a lien for labor and materials not done upon or furnished for any building, or the appurtenances of any building. They must allow a lien for work which does not benefit the lot or building in question, and do injustice and work a fraud upon others furnishing labor and materials for the same, on the faith that others have a lien only to the extent of the labor and materials *visibly* furnished for the building itself; and also the effect might be to collect a debt due only from one person, from the estate of another.

The only practicable rule, in such case, seems to be, that if an entire contract includes work for which a party would, if the same was done separately, have no lien, with work or materials for which, if separately furnished, he would have a lien, instead of enforcing the non-lien claim with the other, he shall be held to waive the claim altogether.

Johnson vs. Pike, 35 *Maine*, 291.
Lumbard vs. Pike, 33 *id.*, 141.
Bicknell vs. Trickey et al, 34 *id.*, 273.

VI.

The court erred in refusing the third instruction on the part of the defendant below, asking for a construction of the contract. It is peculiarly the province of the court to construe a contract, when given in evidence.

VIII

W. K. McALLISTER,
Counsel for Appellants.

The Court Erred in giving the Third Instruction on the part of Plffs below.

Plffs Claimed for Extra Work done upon request (See Abstract page 4) The Answer neither admits nor denies the allegations of bill as to Extra Work Plff were therefore bound to prove them

[illegible]

De Wolf vs Long 2 Gil 679

Now this instruction makes the mere doing of the work upon defts premises sufficient to create the lien

Work done on the premises of another however meritorious ~~affords no~~ forms no ground of action at common law without a request

Bartolomew vs Jackson 20 John R 28

The Instruction should have been based upon the hypothesis of a request

213

Pennebaker &c
v
Hendricks &c

Brief

Filed Apr 26, 18[illegible]
L. Leland
Clerk

W B Scates
W K McAllister
for Applts