

No. 11954

Supreme Court of Illinois

Kelley, et al,

vs.

Chapman, Admr.

71641  7

Lee County -
Milo Kelly et als.
vs.
Daniel Chapman Admr.

74

1852

11954

Prepared

State of Illinois }
Supreme Court }

June Term 1882

Milo Kelly Harry Colburn }
and Messrs Middleton }
vs }
Daniel Chapman Adams }

And now come the said plaintiffs
in error by Higgins. They & demand their solicitors and
say that in the record & proceedings in this cause there is
manifest error in this to wit

- 1st The Court erred in rendering the decree for the complainants
and instead of dismissing the Complainants bill
- 2^d The Court ^{erred} in rendering the decree without having first
made Timothy J Williams, Major Chamberlain & Francis Tice
parties to the suit.
- 3^d The evidence in the cause was not sufficient to sus-
tain the allegations in the bill & to support the decree
- 4th The bill is substantially defective
- 5th The decree is uncertain contradicting & imperfect in this
to wit
 - 1st The Court did not determine what disposition
should be made of the proceeds of the sale of the premises
 - 2^d There is no adjudication by the Court in relation
^{alleged to have been} to the note brought into Court by the Complainants
 - 3^d There is no judgment or decree of the Court determining

The amounts of the Complainants recovery. Nor of whom it is recovered.

4th There is no person appointed by the Court to make the sale of the premises

5th There is no decree that the person to sell report his proceedings to the Court for confirmation

~~6th There is no report of sale & confirmation thereof~~

6th The Court did not determine whether Mellett was or was not a mortgagee but decreed a sale without determining this question

7th The Court in one part of the decree determines that the costs are to be paid out of the proceeds of the sale & in another that "Moses Mellett upon the payment of costs go hence without day"

8th The decree is in other respects loose, inaccurate, uncertain, contradictory & insufficient - defective in form & substance

6th It does not appear by the record when & in what manner the bill was amended.

7th The Record contains no decretal order making up an issue or issues of fact for the jury. Nor does it in any manner appear what question or questions of fact were determined by the jury. No issue was made or tried in regard to the rights of the mortgagee - the jury merely found an indebtedness on the part of the original owner without finding any other fact or having any other issue submitted to them.

9th It is more proper for the jury to determine the whole case as in proceedings at common law. They should have apportioned the damages upon the default of Colburn.

For these errors the plaintiffs are entitled to a new trial.

Certain persons said that said record reversed annulled & held
for naught. & the case remanded to the Court below
Higgins Thos & Seland
for bills in error

See.

Fuller class

Chapman class

Assignment of cases

Filed June 30th 1852.
J. S. Leonard Clerk.
Wm. J. W. Leonard Deputy.

Pleas in the Honorable the Circuit
Court of Lee County & State of Illinois—

On this day to wit:
the 21st day of December A.D. 1846 among
the Records of said Courts the following trans-
cript from the Records of the Honorable
the Circuit Court of Ogle County Illinois
and which is in the figures and words
following to wit:

State of Illinois of
Ogle County

At a Court began and
held at Oregon in said County pursuant
to the Statute in such case made and
provided On Monday the 21st day of
September A.D. 1846— Present the Hon
John D. Eaton Judge— E. M. Dutcher
Sheriff— Henry Roberts Clerk—
When & where the following among other
proceedings were had—to wit:

Stephen Chapman	{	May Term 1846
vs		Pet. for Lien
Harvey Colburn & Milo Kelly		

It being made to
appear to the Court, by Petition that Moses
Kittleton is interested by being Mortgagee
of the Premises mentioned and set forth
in Plaintiffs Petition in this cause— It is
ordered by the Court, that Plaintiffs

Petition be so amended as to make the said
Moses Nettleton a party Defendant to this
suit

Stephen Chapman }
vs } Petition for Lien
Harvey Colburn et al } Sept. T. 1846

And now on this day
came on to be heard the Demurrer of the
Defendant to the Plaintiff's Petition herein
and after the argument of counsel, and
the same having been fully heard, and
the Court fully advised, sustains said
Demurrer, and thereupon on motion of
Plaintiff is granted by the Court to
amend his petition

Stephen Chapman }
vs } Pet. for Lien
Harvey Colburn et al } Sept 1846 Sept 25th

And now at this day again
came the said Plaintiff and enters his motion
and files his affidavits for a change of venue
in this cause, and the same having been
heard and the Court being fully advised orders that
the venue in this cause be changed to the
County of Lee, and that the Clerk of this Court
make out a transcript of all the orders
heretofore entered in this cause and transmit
the same together with all the papers now
on file in said cause to the Clerk of the
Circuit Court of Lee County

State of Illinois of
Ogle County

I Henry Roberts clerk of the
Circuit Court of said County hereby certify
that the foregoing is a true and full copy
of the Records & Proceedings in the above enti-
tled cause as appears of record —
And further certify that the paper here to
annexed and marked "A" is the Plaintiffs
Petition, and the one marked "B" is the
Summons and the one marked "C" is the
Petition of Moses Nettleton, and the one
marked "D" is an affidavit, and the one
marked "E" is the Denial of the De-
fendants to the Plaintiffs Petition, and the
one marked "F" is an affidavit, and the
one marked "G" is the Plaintiffs Bill
cost made in this cause, and that there
are all the papers filed in this cause and
appertaining forming any part of the
Record thereof

Seal

In testimony whereof I
have hereunto set my hand
and the seal of said Court at my
office in Oregon this 16th day
of December A.D. 1846

Henry Roberts
clerk

And afterwards on the day & year aforesaid was
filed the Petition of Stephen Chapman in
the above entitled cause — Same endorsed
"Filed August 1st 1845 - Henry Roberts"
clerk

Stephen Chapman

vs

Harvey Colburn &

Milo Kelly partners

doing business under the
style of Kelly & Colburn &

Moses Kettleton

Of the Sept. Term of
the 8th Co. Circuit
Court A.D. 1845To the Hon John D. Catron
one of the Judges of the
Supreme Court of the State of Illinois & Judge
of the Ninth Judicial Circuit in said State

The petition of Stephen Chapman
for the benefit of a Mechanics lien respectfully
sheweth unto your honor, that your petitioner
on or about the first day of August in the year
of our Lord one thousand eight hundred & forty four
made a verbal contract with one Milo Kelly
& one Harvey Colburn the then owners of a
certain lot or tract of land situate lying & being
in the said County of Ogle, to wit, the North West
quarter of the North east quarter of section
number twenty seven in township number
twenty three of range eleven east of the fourth
principal meridian, to perform labor & work as a
Mechanic & millwright in & about the erection, build-
ing & completion of a certain flouring or grist
mill for them the said Kelly & Colburn on the
land aforesaid; and the said Kelly & Colburn then
& there requested & desired that your petitioner
should & would perform work & labor as a Mill-
wright in said Mill, and your Petitioner im-
mediately thereafter, to wit on or about said
first day of August in year of our Lord 1844
commenced on said work and continued

not attended to by the petitioners. The petitioners of the period of time from the time of making the contract to the time of payment of the sum of five hundred and twenty dollars.

So to work & labor on the said Mill situated on the said land owned by the said defendants as aforesaid, nearly the whole time until on or about the twenty ninth day of May 1845 and that between the said first day of August 1844 and the said twenty ninth day of May 1845 - your petitioner did in pursuance of said request of said defendants work and labor on said Mill or tenement, two hundred and eight days; and your petitioner further avers that at the time the said defendants so requested and desired your petitioner to work & labor as aforesaid the said defendants promised and agreed to pay your petitioner therefor so much money as the same should be reasonably worth, whenever your petitioner should cease his work & labor thereon, to wit on the 29 day of May 1845, and that your petitioner did cease his work & labor on the said tenement or Mill and for the said defendants on or about said twenty ninth day of May A.D. 1845 and not before; and your petitioner further avers that no particular amount of work & labor was agreed to be done or performed by your petitioner in & by said contract, nor was any particular price or value agreed upon between your petitioner and the said defendants, but the said defendants at the time of making said contract agreed to pay to your petitioner so much as the same should be reasonably worth. And your petitioner avers that the work & labor so laid out & expended by him upon & about said Mill or tenement at the special instance & request of the said defendant was reasonably worth the just & full sum of five hundred and twenty dollars; and your petitioner reasonably deserved to have the said sum of

Money of & from the said defendants therefor; and that the said sum of money was due & payable by & from said defendants to your petitioner on or about said twenty ninth day of May A.D. 1845 at which said time & wit, on said twenty ninth day of May A.D. 1845 at the County aforesaid a balance was struck between the said defendants & your petitioner; and the said defendants then & there admitted & acknowledged that the work & labor of your petitioner so bestowed as aforesaid was worth the just & full sum of five hundred & twenty dollars as aforesaid; and the said defendants, having before that time paid to your petitioner in Money, goods & merchandise the sum of one hundred and twenty two dollars and twenty four cents then & there gave their promissory note to your petitioner, and thereby promised to pay to your petitioner or bearer three days after the date thereof the sum of three hundred & ninety seven dollars and seventy six cents with use, the said sum in said promissory note specified as aforesaid being the balance then & there due & payable from & by the said defendants to your petitioner out of the whole sum of five hundred and twenty dollars at first due your petitioner for his said work & labor bestowed upon said Mill as before mentioned; and that at the time of the delivery of said promissory note by the defendants to your petitioner. Your petitioner received and accepted the same as evidence of indebtedness, only and not as payment or an extinguishment or modification of the debt

due from said defendants to your petitioner, and further that your petitioner has not at any time hitherto assigned endorsed nor transferred the said promissory Note of the said defendants, but now brings the same into Court here ready to be cancelled and delivered up to the said defendants; and further that the said sum of three hundred and ninety seven dollars and ~~seventy~~^{seventy} six cents with interest in which said sum the said defendants as aforesaid acknowledged themselves to be indebted to your petitioner or any part thereof has not been paid to your petitioner by the said defendants nor either of them nor by any other person for them except the sum of fifty two dollars which was paid to your petitioner on the fourteenth day of June A.D. 1845; and so your petitioner avers that the just & full sum of three hundred and ninety seven dollars and seventy six cents with interest as before mentioned after deducting out the sum of fifty two dollars paid as aforesaid, which leaves a balance of three hundred & fifty dollars or thereabouts at the date of the filing of this petition, is still due & owing from & by the said defendants to your petitioner —

Wherefore as six months have not elapsed from the time of the completion of said work & labor when said money became due & payable before the filing of this petition and by reason of the premises aforesaid and by force of the Statute in such case made & provided Your petitioner humbly prays that by the judgment of this Honorable Court, he may have the benefit of a Mechanic's Lien and that the same may attach on said

Stephen Chapman

vs

Harvey Colburn &
Milo Kelly partners under
the style of Kelly & Colburn

} of the Sept. Term of the
Ogle County Circuit Court
A.D. 1845

Clerk of said Court, please issue
summons for the above named defendants ac-
cording to the foregoing petition in this cause return-
able at the next term - Damages five
hundred dollars

J. G. Patrick for
Plff

Stephen Chapman

vs

Harvey Colburn & Milo Kelly
partners under the firm
of Kelly & Colburn

} Sept Term of Ogle County
Circuit Court A.D.
1845

Clerk of said Court please
issue subpoena for Plaintiffs witnesses in this
case to wit, Solomon Langdon, Francis Rice
Lyman Morgan Daniel Morrison & Daniel
Chapman

J. G. Patrick for Plff

And by way of further supplement & amendment
to the foregoing petition in pursuance of the order of Court,
your petitioners hereby prays that the said Moses Nettleton
may be made a party defendant hereto as claiming
an interest in the aforementioned & described
premises And the said Nettleton be required
to answer your petitioners foregoing of complaint
accordingly

J. G. Patrick
for Plff

The same endorsed - Filed August 1st 1848.
Henry Roberts Clerk

^{D.}
Stephen Chapman
vs
Milo Kelly & Harvey Colburn
partners &c

Sept. Term of Ogle Co.
Circuit Court
A.D. 1845

S. G. Patrick states on
oath that he is the attorney of the said
Plaintiff employed to commence & to conduct
the above entitled cause & that at the time of the
filing the petition herein he understood &
believed the said Colburn defendants
Christian name to be Henry & not until after
the said petition was placed on file did
this deponent discover from papers
which came into his possession & upon
inquiry made that the Christian name
of said Colburn was Harvey & not Henry,
& further that as soon as said mistake
was discovered this deponent had the same
rectified in the summons in this case
before the same was served on the
said defendants

Sworn & subscribed
before me in open court
this 23rd day of Sept. A.D. 1845
Henry Roberts clk

S. G. Patrick

Same endorsed "Filed Sept 23^d 1845 Henry
Roberts clk

Circuit Court Ogle County May T 1846
Stephen Chapman vs Harvey Colburn & Milo
Kelly

And said Hanez Colburn & Milo Kelly by
Fuller their atty comes & defends &c

And say that prayer of the Petition of said
Chapman ought not to be granted because
they say that the matters & things stated &
set forth in said Chapman's petition are
not sufficient in law to entitle the said
Chapman to the relief prayed for in said
Bill, & the said Defts are not bound to
answer thereunto

And the said Defts show to the Court here
the following causes of Demurrer to sd Peti-
tion

1st That said Petitioner does not state or
set forth the time when said sum money
so alleged to be due for said supposed work
& labor of said Chapman was contracted
to be paid by said Defts

2^d. Because it does not appear in & by
said Petition that the time of completing
the contract for said work & labor was
not extended for a longer period than
three years from the time of making
the same

3^d Because it is not alleged in & by said
Petition that the time of payment of said
money was not extended beyond the period
of one year from the time of comple-
ting said contract

4th Because said Petition is in other respects
uncertain, redundant & defective & in-
sufficient whereupon said Defts pray
the judgment of the Court if they shall

be required further to answer thereto
By M N Fuller
their Atty

And afterwards on the day and year aforesaid
was filed the following Affidavit in the
above entitled cause - Same endorsed "Filed
Sept 24th 1846 - Henry Roberts clk

Stephen Chapman }
v } Pending in Circuit Court
H. Colburn & M. Kelly } of said County Sept 7 1846

H. A. Mix Attorney for said
defendants first being duly sworn on oath
states that he is informed by said defendants
& verily believes that they have a good and valid
set-off against the demand or note of said Chapman
sued in this suit - amounting in all to the
sum of One hundred dollars and upwards
And that the attorneys of said defendants can-
not safely proceed to the trial of said cause
in the absence of said defendants - And
this affiant further says that both of said
defendants are sick and confined at their
respective residences in White Oak Grove
this County and are utterly unable to attend
the present term of this Court as this affiant
has been informed and believes

Subscribed & sworn to before me }
this } of September 1846 } H. A. Mix
Henry Roberts clk } 3

Afterwards on the day and year aforesaid
 was placed on the files of said Court
 the following Bill of Costs
 Circuit Court of Ogle County Sept Term 1846

2. Stephen Chapman

versus

Harvey Colburn et al defendants

Plaintiffs Costs, viz:

Clerk's fees Iss Sum 50 fil same 6 1/4	56 1/4
Dock suit 3 times 37- app Plff	50
app of debt 12- sum to app 12 1/2	25
Fil 4 papers 15 order to amend pet on De muer	25
Motion for change of sum	25
order allowing change sum	25
Cost to May 1 1846	25
" " Sept. " "	25
Transcript 60 certificate 50	110
Bill of Cost 37- copy 25	62 1/2
Shff Rev Sum on 2-100 16 milge 100 at 12- 212	212
	6.40

I Henry Roberts Clerk of the Circuit
 Court of Ogle County, do hereby certify
 that the above is a true bill of costs
 in the above entitled cause as appears
 of record. Witness my hand and the
 seal of said Court this 16th day of
 December 1846

Henry Roberts Clerk

And afterwards on the day & year aforesaid was
filed the Petition of Moses Nettleton in
the above entitled cause - Same indorsed
"Filed May 4th 1846 Henry Roberts clk

P. C. r

Circuit Court Ogle County May 7 1846

To the Hon J. D. Caton one of the associate Justices
of the Supreme Court of Illinois assigned
to hold circuit court in the Ninth Judicial
Circuit Courts

The petition of Moses Nettleton of said
County respectfully shows that your Petitioner
is interested in the premises described in &
intended to be sold by a certain Petition for a
Mechanics Lien filed in said Court & now pending
therein by Stephen Chapman against
Harvey Colburn & Milo Kelly, which premises
are thus described to wit the north west
quarter of the north east quarter of Section
No. 27 in township No. twenty three North in
Range Eleven east of the fourth princi-
pal Meridian containing forty acres, to-
gether with water power & flour Mill thereon
standing And your Petitioner further shows
that his interest is that of a Mortgagee of
said premises, by virtue of the assignments
of two certain Mortgages thereof, one executed
by said Colburn to Major Chamberlin bear-
ing date June 15 A.D. 1843, to secure the sum
of Nine Hundred & twenty five dollars,
which Mortgage & the said debt or sum
of money thereby secured were duly assigned

by your Petitioner by said Chamberlin on fifth day of September 1844, & both the Mortgage & assignment are duly acknowledged & recorded with the records of Deeds of said county, also by virtue of another Mortgage bearing date the 26 day of July 1843 made by Francis Rice to said Chamberlin to secure the sum of Nine Hundred dollars which Mortgage & Debt were duly assigned by said Chamberlin to your Petitioner on the said 5th of September 1844 & both said Mortgage & assignment duly recorded with the Records of Deeds of said county, and your Petitioner further shows that both said Mortgages are still in full force & in no part satisfied but the several sums of money mentioned in & secured by said Mortgages are wholly due & unpaid; wherefore your petitioner prays that he may become a party to said Process or suit for a lien on said premises - And that the rights of your Petitioner may not be affected by said Petition of said Chapman or the proceedings under it, but the right Equity to redeem said premises being the only interest or right therein which said Colburn & Kelly had at the time of making the contracts with said Chapman, as by his Petition appears, may alone be subject to the lien prayed for by said Chapman & for such other & further relief as to law & justice may seem meet. As in duty bound will ever pray

Moses Nettleton
By M. W. Fuller
His Sol,

And afterwards to wit at the April Term
of the Lee County Circuit Court A.D. 1847
and on the 14th day of said April A.D. 1847
came the said Plaintiff and files his Demurrer
to the said Nettleton's petition herein which
is in the words & figures following to wit:

Stephen Chapman

is

Harvey Colburn & Milo Kelly
partners &c & Moses Nettleton
Mortgage &c

}
} Petitioner for Wre-
} chancery Lien -
} Of the April Term
} of the Lee County Cir-
} cuit Court A.D. 1847

And the said Plaintiff by
Patrick his atty for & answer to the Petition
of the said Moses Nettleton says that the
prayer of said Nettleton's petition ought
not to be granted in & manner and form
as the same is prayed - Because he says that
the said Petition and the matters & things
therein alleged are not sufficient in Law
to warrant the granting thereof in manner
and form as the same is prayed -
For the following reasons to wit: Said
Petition prays that the Lien of the said
Plaintiff may attach only on the right
of said Kelly and Colburn & redeem said
Land with the appurtenances from the
incumbrance in said Petition mention-
ed & set forth - which would be contrary
to the Statute in such case made and
provided - And that said Petition of said
Nettleton is in other respects defective
informal & insufficient - wherefore
the said Plaintiff prays Judgment & his costs &c
S. G. Patrick for plff

And on the day last aforesaid - to wit on the
14th day of April A.D. 1847 in said Lee County
Circuit Court came said Nettleton and
filed his replication to said Demurrer
in the words following, to wit: And
said Jeff pro se &c - because
he says that said petition is sufficient
in Law

W. W. Fuller

At the said April Term of said Lee County Cir-
cuit Court A.D. 1847 - and on the 13th day
of said April on the records of said Court is
the following entry to wit:
State of Illinois of Circuit Court of said
Lee County County April Term A.D. 1847
April 13th

Stephen Chapman

vs

Milo Kelly & Harry Colburn
partners under the style of
firm of Kelly & Colburn

This day came the
said Defendants by Fuller their atty and enters
his motion that Moses Nettleton have leave
to become a party to this suit - also this day
came the said Plaintiff by Patrick atty
and on his motion it is ordered by the Court
that the said Plaintiff have leave to have
the certificate of the Clerk of the Circuit
Court of Ogle County & the Transcript of
papers transcribed in this cause amend-
ed by said Clerk, and afterwards to wit on
the 17th day of August A.D. 1847 at the
August Term of the said Lee Circuit

Court 1847 an order was entered on the
Records of said Court in the words & figures
following to wit:

Stephen Chapman

vs

Harvey Colburn, Milo Kelly &
Moses Nettleton

This day came the
said Plaintiff by Knox & Smay his attys and
on his motion It is ordered by the Court that
the said Defendants file their answers to the
said Plaintiff's Petition in this Court by 2
o'clock P.M. of this day -

And afterwards to wit: On the day 7
year last aforesaid at said August Term
A.D. 1847 came the said Milo Kelly and filed
his answer herein, which is in the words
and figures following to wit:

See Circuit Court Aug 7 1847
Stephen Chapman

vs

Harvey Colburn Milo Kelly &
Moses Nettleton

Petition for a Lien
Milo Kelly one of the
Defendants above named saving all advantage
of exception to the many defects, uncertainties
and imperfections in said Petition for Answer
to some of them as he is advised it is requi-
- site for him to answer - says - that it is
not true as set forth in said Petition that
said Chapman contracted or bargained
with this respondent on or about the first
of August 1844 to perform the work & labor
on the Flour Mill in said Petition mentioned

-ed nor any other time - That this respondent was not the owner - nor had he any interest in the parcel of Land and Mill described in said Petition on or about the said first day of August 1844 - nor for a considerable time thereafter - and he did not become interested in said Lot of Land or Mill till after said Chapman had begun to work thereon And this respondent has been informed And believes it to be true that said Chapman began said work upon said Mill under a contract with David D. Cable, who claimed to own said Land & Mill on or about said first day of August 1844 - And that said Chapman was not apprized by this respondent of the fact that this respondent had acquired an interest in said Mill till October 1844 - And this respondent further says that the bargain between said Cable & Chapman under which said Chapman performed said work on said Mill was as he has been informed and believes that said Chapman should receive two dollars & half a day for his work during summer and two dollars during winter - And respondent says that said Chapman worked as much as three months according to the recollection of this respondent during the winter season of 1844 & 1845 upon said Mill for which according to said contract with Cable said Chapman was not entitled to receive but two dollars per day - And this

Court 1847 an order was entered on the
Records of said Court in the words & figures
following to wit:

Stephen Chapman

vs

Harvey Colburn, Milo Kelly &
Moses Nettleton

This day came the
said Plaintiff by Knox & Drury his attys and
on his motion It is ordered by the Court that
the said Defendants file their answers to the
said Plaintiff's Petition in this Court by 2
o'clock P.M. of this day -

And afterwards to wit: On the day 2
year last aforesaid at said August Term
A.D. 1847 came the said Milo Kelly and filed
his answer herein, which is in the words
and figures following to wit:

See Circuit Court Aug 7 1847
Stephen Chapman

vs

Harvey Colburn Milo Kelly &
Moses Nettleton

Petition for a Lien

Milo Kelly one of the
Defendants above named saving all advantage
of exception to the many defects, uncertainties
and imperfections in said Petition for Answer
to some of them as he is advised it is requi-
- site for him to answer - says - that it is
not true as set forth in said Petition that
said Chapman contracted or bargained
with this respondent on or about the first
of August 1844 to perform the work & labor
on the Flour Mill in said Petition mentioned

Respondent further says that it is true that he and said Colburn made a Note to said Chapman as set forth in the Petition in consideration of the work done by said Chapman upon said Mill under said contract with said Colb. But at the time of giving & signing said Note, neither this respondent or said Colburn (as this respondent believes) had no knowledge that said work was done under an express contract - That said Chapman was to receive only two dollars per day during the winter season, and said Chapman claimed to receive two dollars & a half a day for all the time he worked on said Mill.

And the same was allowed him at that rate through the mistake of this respondent & said Colburn. And the deception of said Chapman. And this respondent says that the work of said Chapman upon said Mill was not worth over two dollars per day during the winter season. And this respondent further unsceing says that he & said Colburn have made divers payments on said Note - amounting to fifty two dollars - which payments were made about the month of July A.D. 1845 - which sum is distinct from the sum named in said Petition, and credited for said work of said Chapman, and also that he & said Colburn have also sundry items of set-off against said Note amounting to the sum of sixty five dollars & forty cents - a Bill of which is annexed to this answer and marked "B" - And this

respondent makes said bill a part of this answer which items of set-off are justly due from said Chapman & said Colburn and this respondent And they claim to have the same allowed in set-off against said Note, and that the same was not included in the sum named in said Petition as credited to said Defendants by said Chapman. And this respondent further says that the Note in said Petition mentioned was made too large by the sum of Forty five dollars by reason of said Chapman's charging fifty cents per day for his work in the winter season more than he was entitled to receive according to his bargain with said Colburn, And this respondent & said Colburn were induced to give a Note of that amount by the deception & false representations of said Chapman and this respondent claims to have the said sum of Forty five dollars allowed and credited on said Note And this respondent further answering says that on or about the 18th day of September 1844 he made executed & delivered to Timothy S. Williams of Otisco New York a deed of Mortgage of two undivided third parts of the parcel of land named in said Petition and of the Mill & other buildings thereon to secure the payment of his note for Three hundred & Eighty dollars as by said Mortgage & Note appear - which Mortgage was duly acknowledged recorded

And that the amount of said note is still due and unpaid, and amounts now to the sum of about Four hundred & forty two dollars and having fully answered said petition, the respondent prays judgment if the prayer thereof ought to be allowed - And that the same may be dismissed

Subscribed & sworn to } Milo Kelly
before me this 17th day }
of August A.D. 1847 }
C. J. Chase }

Clk

To which was appended the following bill marked "B"

Mr Stephen Chapman		Dr
to Colburn & Kelly		
"	To Balance due on Book acc	\$ 6.40
"	To Board & nursing when sick	
"	3 week @ \$3. —	9.00
"	Damage done stack of oats which you promised to pay	6.00
"	4 months horse keeping - hay & grain &c - per week	39.00
"	Time spent in hunting horse which you promised to pay	5.00
"	Cost paid last July —	52.00
		<u>\$ 117.40</u>

The same produced. Filed August 17th 1847 C. J. Chase Clerk.

And afterwards to wit on the 18th day of August. A.D. 1847 came the said plaintiff and filed his replication herein to the foregoing answer, which replication is in the words and figures following to wit.

S. Chapman

vs } Replication of S. Chapman to the
Kelly & Colburn } the answer of Miles Kelly one of
J. Atkinson }

Respondents.

This Replication saving & reserving to himself all exceptions to the insufficiency of said answer, for replication thereto saith that he will aver and prove his said petition to be true certain and sufficient to be answered unto, and that the said answer of the said defendant is untrue, uncertain and insufficient to be replied unto by this Plaintiff, without this that any other matter or thing whatsoever in the said answer contained material or effectual to be replied unto, confessed and avoided traversed or denied is true, all which matters and things this Plaintiff is and will be ready to aver and prove as this Court shall direct and hereby prays as in and by his said petition he has already prayed

Patrick Knox & Drury

Atty for Plaintiff

Same endorsed "Filed August 18th 1847

C. L. Hume Clerk

And afterwards to wit. on the 17th day of August A.D. 1847. of the August Term of the said Lee County Circuit Court, came the said Moses Nettleton and filed his answer to the Petitioner's petition herein. which answer is in the words and figures following to wit.

State of Illinois } Circuit Court. August Term 1847
Lee County }

Stephen Chapman } Harry Colburn, Miles Kelly.
Petitioner for Lien } Petitioner &c and
Moses Nettleton Deft.

Moses Atkinton one of the Defendants above named comes in his own person and reserving all advantages of exception to the many defects, uncertainties and insufficiencies in said Chapmans petition makes answer thereto or to so much thereof as this Respondent is advised is material to be answered by him as follows, to wit, This Respondent says that on the fifth day of September 1844 he took an assignment in due form of law for an adequate and valuable consideration, of Major Chamberlain, of two Mortgage Deeds, one of which Deeds was executed by Francis Tins to said Chamberlain and bears date Feb'y twenty six A.D. 1843 conveying to said Chamberlain and his assigns two undivided third parts of the parcel of Land described in said Chapmans Petition together with the mill and other buildings thereon situated, and being the two undivided third parts of the ^{North West Quarter of the} North East quarter of section No. twenty seven in Township No. twenty three of Range eleven east of the third principal meridian to secure the payment of nine promissory notes signed by said Tins & David D Cable to said Chamberlain one for one ~~thousand~~ ^{hundred} and twenty five dollars and eight for one hundred dollars each all bearing date April first A.D. 1843 with interest at six percent from their date, and the eight last mentioned notes were then and then duly assigned to this Respondent by said Chamberlain & then & there delivered to this Respondent, on which said eight notes there is now due the sum of nine hundred and fifteen dollars and five cents, to secure the payment of which this Respondent holds the said Mortgage so made by said Tins and assigned by said Chamberlain to this Respondent as aforesaid, bears date the fifteenth day of June A.D. 1844. and was

The other

duly executed and delivered by said Henry Colburn
to said Chamberlin and his assigns, conveying to
him in mortgage one undivided third part of
the said parcel of Land above mentioned with
the mill and other buildings thereon to secure the
payment of nine promissory notes made by said
Colburn to said Chamberlin all bearing date April
1st 1843. one for one hundred and twenty five dollars,
and eight for one hundred dollars each, all bearing
interest at six per cent from their date, all said notes
were then and then duly assigned ^{and delivered} by said Chamberlin
to this Respondent, and to secure the payment of
which said notes or the balance now due upon
them, which amounts to the sum of eleven hundred
and forty two dollars and fifty six cents including
the interest, this Respondent now holds said last
mentioned mortgage Deed and the assignment
thereof. And this Respondent further answering
says that at the time of making and executing
said mortgage Deed, said Lin and Colburn were
the owners of said parcel of Land and the buildings
thereon in fee simple and duly authorized to make
and execute said mortgage in manner as above
mentioned. both of which mortgage Deeds were duly
acknowledged and recorded in the Ogle County
Records of deeds and Conveyances according to law.
all which notes and mortgages this Respondent
brings into Court and refers to and makes a part
of this answer. And this Respondent further
answering says that at the time when said mort-
gage Deeds were executed and delivered as aforesaid,
there was upon said premises the flour mill
mentioned in said petition which said mill was
then enclosed sided and shingled and most of
the floors laid and also the Bars or frame for the

for the stones to rest on was mostly made, and the
water wheel mostly made, and two pair of Run
stones and bolting cloths and most of the irons to
run said mill, were all in or near ^{the} ~~the~~ mill
ready to be placed therein, and the spur & pit wheels
used in said mill were nearly completed, all which
materials and work had been done before said ~~Chas-~~
~~les~~ Chapman began to perform any work on
said mill as set forth in said Chapman's petition -
Moses Nettleton

Subscribed & sworn to before me
this 16th day of August AD 1847

B. J. Chase Clerk

Endorsed - "Filed August 17th 1847

B. J. Chase Clerk"

With which decree was appended and filed the
following mortgages, to wit -

I know all men by these presents that I
Francis Lillie of the County of Ogle and State of Illinois
in consideration of the sum of nine hundred dollars
to me in hand paid by Major Chamberlain of said
County and State the receipt whereof is hereby ac-
knowledged, do by these presents give, grant, bargain
sell and convey unto the said Major Chamberlain his
heirs and assigns the following described tract or
parcel of Land situated in said Ogle County, to wit:
the equal undivided two thirds of the North West
quarters of the North East quarter of Section Number
Twenty seven in Township Number twenty three of
Range Number Eleven East of the fourth P.M., being
the same property or premises conveyed to me by said
Major Chamberlain. To Have and to hold the aforesaid
premises with the mill and the other buildings thereon
and the privileges and appurtenances to the same belonging
to him the said Major Chamberlain his heirs & assigns.

forever. And I the said Francis Tice for myself my
heirs executors ^{and} administrators do covenant with
the said Major Chamberlin his heirs, executors, ad-
ministrators and assigns, that I am lawfully seized
in fee of the aforesaid premises. That they are free
from all incumbrances, that I have good right
and full power to sell and convey the same to him
the said Major Chamberlin his heirs executors and
administrators as aforesaid. and that I will and
my heirs executors and administrators shall warrant
and forever defend the same, to him the said Major
Chamberlin his heirs executors administrators and
assigns against the lawful claim of all persons
whomsoever. Provided always that if the said
Francis Tice and David D. Cable or their lawful
heirs or assigns shall well and truly pay to the
said Major Chamberlin his executors, adminis-
trators or assigns at the time they shall respectively
become due the following described notes of hand
signed by the said Francis Tice and David D. Cable
and all dated on the first day of Apr in the year
of our Lord one thousand eight hundred and
forty three, and made payable to Major Chamberlin
(to wit. one of one hundred and twenty five dollars
payable one year from date with interest at the
rate of six per cent from date. One for one hundred
dollars payable two years from date at the rate
of six per cent from date. One for one hundred
dollars payable three years from date. with simple
interest. One for one hundred dollars payable four
years from date with simple interest. One for one
hundred dollars payable five years from date with
simple interest from date. one for one hundred
dollars payable six years from date with simple interest
from date. One for one hundred dollars payable)

seven years from date with simple interest -
One for one hundred dollars payable eight years
from date with interest - One for one hundred
dollars payable nine years from date with interest)
The above notes amounting to nine hundred dollars
which if paid as above written or before, the above
contract to be null and void otherwise to remain
in full force and effect. And the said Chamber-
lain is hereby authorized to enter or foreclose upon
the failure to pay either of the above described pay-
ments of said notes for the amount that may then
be due -

In testimony whereof I hereunto set my
hand and seal this twenty sixth day of July in
the year of our Lord one thousand eight hundred
and forty three

In the presence of Francis Rice (LS)
David D Cable
Joseph Williams

On which is the following acknowledgment and
certificate of the Recorder to wit -

State of Illinois

Ogle County } On the twenty sixth day of
July in the year of our Lord one thousand eight
hundred and forty three personally appeared
before me the subscriber a Justice of the Peace
in and for said County of Ogle Francis Rice
personally known to me to be the person who
executed the above Deed, and acknowledged that
he executed the same freely and voluntarily
for the use and purposes therein mentioned

Given under my hand and seal this twenty
sixth day of July in the year of our Lord AD 1843
Joseph Williams J.P. (LS)

Chamberlin one hundred dollars with interest at
the rate of six per cent from date

Watertown April 1. 1843

Francis Tice

Same endorsed on back

David D Cable

"Without recourse on me
for debt or costs"

Major Chamberlin"

\$100. Three years from date for value received
we jointly promise to pay Major Chamberlin
one hundred dollars with simple interest from
date

Watertown Apr 1. 1843.

Francis Tice

David D Cable

"Without recourse to me for debt or costs"

Major Chamberlin"

\$100. Four years from date for value received we
jointly and severally promise to pay Major
Chamberlin one hundred dollars with simple
interest from date.

Watertown April 1. 1843

Francis Tice

Same endorsed

David D Cable

"Without recourse to me for debt or costs"

Major Chamberlin"

\$100. Five years from date for value received we
jointly and severally promise to pay Major
Chamberlin one hundred dollars with simple
interest from date.

Watertown Apr 1. 1843

Francis Tice

Same endorsed

David D. Cable

"Without recourse to me for debt or costs"

Major Chamberlin"

\$100. Six years from date for value received we jointly
and severally promise to pay Major Cham-
berlin one hundred dollars with
simple interest from date.

Watertown April 1. 1843

same endorsed

Francis Lice

"Without recourse to me for David D Cable
debt or costs

Major Chamberlin"

\$100. Seven years from date for value received we
jointly and severally promise to pay Major
Chamberlin one hundred dollars. with simple
interest from date

Watertown April 1. 1843

Francis Lice

same endorsed

David D Cable

"Without recourse to me for debt or costs

Major Chamberlin"

\$100. Eight years from date for value received we
promise jointly and severally to pay Major
Chamberlin one hundred dollars with simple
interest from date

same endorsed

Francis Lice

David D Cable

Without recourse to me for debt or costs

Major Chamberlin

\$100. Nine years from date for value received we
jointly promise to pay Major Chamberlin
one hundred dollars with simple interest
from date.

Watertown April 1. 1843

Francis Lice

David D Cable

And the other mortgage in the words and figures
following to wit

Know all men by these presents that
I Mary Colburn of the County of Ogle and State of
Illinois in consideration of the sum of nine hun-
dred ~~dollars~~ and twenty five dollars to me in
hand paid by Major Chamberlin of the State and
County aforesaid the receipt whereof is hereby

acknowledged do by these presents give grant bargain sell and convey unto the said Major Chamberlin his heirs and assigns the following described tract or parcel of land situated in said Ogle County to wit. The equal and undivided one third part of the North west quarter of the North East quarter of Section N^o (27) twenty seven in Township N^o (33) twenty three of Range N^o (11) Eleven East of the fourth principal meridian being the premises conveyed to me by Solomon Langdon to have and to hold the aforesaid premises with the mill and other buildings thereon and the appurtenances to the same belonging to him the said Major Chamberlin his heirs and assigns forever and I the said Harvey Colburn for myself, heirs, executors and administrators do covenant with the said Major Chamberlin his heirs executors and administrators and assigns that I am lawfully seized in fee of the fee granted premises, that they are free from all incumbrances, that I have good right and full power to sell the same to him the said Major Chamberlin his heirs executors administrators and assigns, against the lawful claims of all persons whomsoever. Provided nevertheless that if the said Harvey Colburn shall now and truly pay or cause to be paid to the said Major Chamberlin his executors or administrators at the time they shall respectively become due the following described notes of hand signed by the said Harvey Colburn as they shall become due all dated on the first day of April in the year of our Lord one thousand eight hundred and forty three to the said Major Chamberlin, to wit.

One note of one hundred dollars payable two years from date with all at six per cent.

511954-197

One note of one hundred dollars payable three years from date with use.

One note payable of one hundred dollars four years from date with use.

One ~~note~~ of one hundred dollars payable five years from date with use.

One note of one hundred dollars payable six years from date with use.

One note of one hundred dollars payable seven years from date with use.

One note of one hundred dollars payable eight years from date with use.

One note of one hundred dollars payable nine years from date with use.

One ~~note~~ for one hundred and twenty five dollars payable in nine years and six months from date with use.

Then the above Deed to be null and void, otherwise to remain in full force and virtue. And the said Chamberlain is hereby authorized to foreclose upon the failure to make either of the above payments of said notes for the amount that may then be due.

In witness whereof I have hereunto set my hand and seal this the fiftieth day of June in the year of our Lord one thousand eight hundred and forty ~~four~~ ^{four}

In Presence of Harry Colburn (L.S.)
Solomon Langdon
Wm. I. Mifflin

On which mortgage is the following acknowledgment, certificate of the Recorder and assignment to wit.

Personally appeared before me Wm. I. Mifflin a Justice of the Peace in and for the County of

Ogle Harry Colborn personally known to me to
be the same person who executed the within deed
and acknowledged the same to be his free act
and deed and desired the same might be re-
corded as such. Ogle County Ill. June fifteenth
A.D. 1844 Wm J. May J. P.

Records Office
Ogle County Ill. I hereby certify that the within
mortgage and assignment was filed for record
in my office November 10th 1847 and recorded
Nov 12th 1847 in Book B of Mortgages pages
145 & 146. Given under my hand and seal
this 12th day of Nov 1847
John M. Hinkle
Recorder

Know all men by these presents that I Major
Chamberlain within named in consideration
of the sum of nine hundred and twenty five dol-
lars to me paid by Moses Nettleton of the County
of Ogle and State of Illinois the receipt of which
is hereby acknowledged, do hereby assign transfer
and convey unto the said Nettleton his heirs
and assigns all my right title and interest in
and to the parcel of land within mentioned &
also the improvements thereon and also all my
right and interest in and to such and all the
notes within named. To have and to hold the
same to him the said Moses Nettleton his heirs
and assigns forever all said notes being still
wholly unpaid. Witness my hand & seal this fifth
day of September in the year eighteen hundred
and forty four Major Chamberlain (Seal)

Signed sealed & delivered in
presence of W. M. Fuller

And the notes filed with said answer & made a part thereof are in the words & figures following to wit:

Two years from date for value received I promise to pay Major Chamberlin one hundred dollars with acc.

April 1st 1843

Nancy Colburn

April 1st 1843

Three years from date for value received I promise to pay Major Chamberlin one hundred dollars with interest from date

Nancy Colburn

April 1st 1843

Four years from date I for value rec^d promise to pay Major Chamberlin one hundred dollars with interest from date -

Nancy Colburn

April 1st 1843

Five years from date I for value rec^d promise to pay Major Chamberlin one hundred dollars with interest from date -

Nancy Colburn

Six years from date for value received I promise to pay Major Chamberlin one hundred dollars with acc.

April 1st 1843

Nancy Colburn

Seven years from date for value received I promise to pay Major Chamberlin one hundred dollars with acc.

April 1st 1843

Nancy Colburn

Eight years from date for value received I promise to pay Major Chamberlin one hundred dollars with acc.

April 1st 1843

Nancy Colburn -

Nine years from date for value received I
promise to pay Major Chamberlain one hundred
dollars with use -

April 1st 1843

Warren Colburn

Nine years and six months from date for value
received I promise to pay Major Chamberlain
one hundred and twenty five dollars with
use -

April 1st 1843

Warren Colburn

all of which notes were endorsed as follows, to wit,

"Without recourse to me for debt or cost"

And afterwards to wit, on the 18th day of August
AD 1847, at the August Term of the said Lee
County Circuit Court came again the said
Stephen Chapman and filed his replication
to the answer of the said Moses Mettison herein
which replication is in the words and figures
following to wit -

S. Chapman —

vs

Wm. Colburn & Mettison

Replication of S. Chape-
man to the answer of Mettison - This Replicant
saying and reserving to himself all exceptions
to the insufficiency of said answer, for repeli-
cation shunts saith that he will aver and prove
his said petition to be true certain and
sufficient to be answered unto, and that
the said answer of the said defendant is
entire uncertain and insufficient to be

to be replied unto by this Plaintiff, without
this that any other matter or thing whatsoever
in the said answer contained material or
effectual to be replied unto, confessed and
avoided traversed or denied is true. all
which matters and things this Plaintiff
is and will be ready to aver and prove as
this Court shall direct & hereby prays as
in and by his said petition he has already
prayed

Patrick, Knox & Drury
Atty for Plaintiff

And afterwards to wit on the 18th day of August
AD 1847. is an order upon the records of the
said Court in the word and figure following
to wit,

Lee County Circuit Court. August Term
AD 1847. August 18.
Stephen Chapman

vs

Wm. S. Kelly, Harvey
Colburn & Moses Nettleton

Justices under the seal of Kelly and Colburn

This day came the
said defendant by Haller his Attorney and
filed an affidavit and ^{intend} ~~filed~~ his motion
for a continuance of this cause to the next
Term of this Court. for reasons ^{in said affidavit} set forth and after
due deliberation upon said motion it is
considered by this Court that the same be
overruled. And afterwards came the said
plaintiff by Knox & Drury & Patrick his

Attorneys and on his motion and it appearing that the said Harvey Colburn one of the said defendants has not filed his answer to the said ~~petition~~ plaintiffs petition in this cause as required by a rule of this Court but has herein made default. It is therefore ordered by this Court that the said plaintiffs petition taken for confessed as to the said Harvey Colburn.

And afterwards to wit. on the 19th day of August A.D. 1847. on the records of said Court is the following entry and order.

Lee County Circuit Court

Stephen Chapman

vs

Milo Kelly & Harvey Colburn

parties doing business under
the style of Kelly & Colburn &

Moses Nettleton.

August Term

A.D. 1847.

August 19.

This day came the said ~~plaintiff~~ ^{his attorney} by Smey & Dany and Patrick, and the said defendants Milo Kelly and Moses Nettleton, by Fuller their Atty. and issue being joined between the said parties, thereupon by the direction of the Court. came a Jury of good and lawful men to wit. William A. Marden, Hannan Collins, James Bartlett, Richard B. Loveland Hubbard Eels, Mathias F. Garrison, William J. Benjamin, John Fry, Cyrus Bridgman, Chauncy Case, William Hender, Peabody

Eastwood, who being duly elected tried
and sworn, to try the issue joined between
the said parties, and after having heard
the evidence, as well on the part of the
said plaintiff as on the part of said
defendants, retired to consider their
verdict and afterwards they return
into court the following verdict, to wit.
We the undersigned jurors in the case of
Chapman vs Kelly & others do find
the issue for the plaintiff, and assess
his damages at the sum of \$391.61
three hundred ninety one dollars and
sixty one cents. Whereupon the said plaintiff's
petition having been heretofore taken for
consent, as to said Harvey Colburn, it
is ordered and considered by the Court
that the lien as prayed for by petition
attach and that a special execution
issue for the sale of said premises.
to wit a certain lot or tract of land
situate lying and being in the County of
Ogle, and State of Illinois, and des-
cribed as the North West quarter of the
North East quarter of Section No twenty
seven, in town twenty three North of
Range Eleven East, of the fourth prin-
cipal Meridian to satisfy said sum
of \$391.61 ^{paid} the plaintiff's damages
by the Jurors in form aforesaid assessed
together with his cost and charges by
him about this suit in this behalf

expended, and that the costs of any other after the satisfaction of the said damages and cost, and charges be paid to the parties who may be entitled to the same, and it is further ordered, that the said Minor Attorneys upon payment of costs go hence without day.

State of Illinois }
In County }

I, Isaac S. Boardman Jr. Clerk
Circuit Court in and for said County,
do hereby certify that the foregoing contains a true, full,
and perfect transcript of the proceedings of said Court
as entered of record, and also of all the papers to the
said filed ~~filed~~ in my office in the above entitled
Cause, except the bill of costs in this cause.

Witness I, S. Boardman Jr. Clerk as afore
said and the seal of said Court at Dixon
this 18th day of May A.D. 1852
I. S. Boardman Jr. Clerk

Clerk of Court for Transcript of 7. 20

I. S. Boardman Jr. Clerk

ESTATE of

Stephen Chapman Deceased.

LETTERS OF ADMINISTRATION.

IN COUNTY COURT,

1852.

STATE OF ILLINOIS,

Ogle County,

shall come. Greeting :

Know Ye, That Whereas

{ Set.

The people of the State of Illinois, to all to whom these presents

of Ogle, and State of Illinois, died intestate, as it is said on or about the *27th* day

of *January* A. D. 1852, having at the time of his decease, personal property in this

State, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; to the end therefore, that said property be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint. *Daniel Chapman*

of the County of Ogle, and State of Illinois, Administrator

of and all and singular the goods and chattles, rights and credits, which were of the said *Stephen*

Chapman at the time of his decease; with full power and authority to secure and collect said property and debts, wheresoever the same may be found in this state, and in general to do and perform all other acts which now are, or hereafter may be required of *him* by law.

WITNESS, JOHN M. HINKLE, Clerk of the County Court in and for the said County of Ogle, at his Office in Oregon, this *26th*

day of *March* A. D. 1852, and the Probate Seal

of said Court hereunto affixed. *this day & date aforesaid*

John M. Hinkle Clerk of the County Court.

State of Illinois /
County of Ogle / I John McHinkle Clerk of the County
Court in and for said County do hereby certify that the
within is a true copy of the Letters of Administration granted
by said Co. Court upon the Estate of Stephen Chapman
decd as appears to me from the Records in my
Office - witness my hand & Seal of said Court
at my Office in Oregon this 17th day of May 1852
John McHinkle Clerk

Ogle County Court.

ESTATE OF

DECEASED.

LETTERS OF ADMINISTRATION.

Book

Page

Filed

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Recorded in Book

Page

Attest:

J. M. HINKLE Clerk.

ESTATE of

Deceased

Lee Co.
Milo Kelly et als.
vs.
Daniel Chapman
Adm'r &c

Filed May 24th 1852.
J. Deland Clerk.
By P. H. Deland Depy Clk.

State of Illinois } ss. Pleas before the Hon. Thomas C. Brown
Lee County }
One of the Judges of the Supreme Court
of said State of Illinois, and Presiding Judge of the
fifth Judicial Circuit of said State.

At a Term of the Circuit Court begun, held
at the Court House in the town of Dixon in & for said
County on the third Monday of August A.D. 1847

It is remembered that heretofore to wit, on the
21st day of December A.D. 1846 the following trans-
cripts and papers certified by the clerk of the Circuit
Court of Lee County in said State were placed on file
in this Court, which said transcripts & papers are
in the words & figures following, (numbered from one
to thirteen inclusive, to wit;

Bill of complaint.

Stephen Chapman

vs.

Of the Sept. Term of the Agh.
County Circuit Court.

Harry Colburn & John Kelly

A.D. 1844

petitioners doing business under the
style of Kelly & Colburn, &

Moses Hamilton

(1)

That Hon. John J. Caton one of the Judges of the
Supreme Court of the State of Illinois and Judge of the
Judicial Circuit in said State.

State of Illinois } The petition of Stephen Chapman for
Coke County } in the capacity of a Mechanic, does
petition your Honor
that your petitioner on or about the first day of Au-
gust in the year of our Lords one thousand eight hun-
dred & forty four made a verbal contract with one
John Kelly and Harry Colburn, the then owners of a
certain lot or tract of lands, situate lying & being in said
County of Coke, to wit, the North West quarter of the
North East quarter of Section Number twenty seven in
Township Number twenty three of Range eleven East of the
Fourth principal Meridian, to perform labor & work as
a Mechanic and Millwright in & about the erection
building & completion of a certain flooring or grist mill
for them, the said Kelly & Colburn, on the lands above
said. And the said Kelly & Colburn then & there requested &
desired that your petitioner should & would perform
work & labor as a Millwright on said mill, and your
petitioner immediately thereafter, to wit, on or about said
first day of August in the year of our Lords 1844 com-
menced on said work and continued so to work & labor
on the said mill situate on the said lands owned by the said Kelly

indentured as aforesaid, nearly the whole time until on or about
the twenty ninth day of May 1845, and that between the said
first day of August 1844 and the said twenty ninth day of May
1845 your petitioner did in pursuance of said request of said
defendants work & labor on said Mills or tenements two hun-
dred and eight days; and your petitioner further avers that
at the time the said defendants so requested & desired your
petitioner to work & labor as aforesaid, the said defendants prom-
ised and agreed to pay your petitioner therefor so much money
as the same should be reasonably worth, whenever your petitioner
should cease his work & labor thereon, to wit, on the 29th day of
May 1845; and that your petitioner did cease his work &
labor on the said tenements ^{for the} said defendants, on or about
said twenty ninth day of May A.D. 1845 and not before; and
your petitioner further avers that no particular amount of work
& labor was agreed to be done or performed by your petitioner
in or by said Contract, nor was any particular price or value
agreed upon between your petitioner and the said defendants,
- but the said defendants at the time of making said Contract
agreed to pay to your petitioner so much as the same should be
reasonably worth; and further that the time for the completion
of said Contract was not extended beyond the period of three
years from the time of making thereof, nor was the time of
payments extended beyond the period of one year from the time
it was made for the completion thereof; and your petitioner
averts that the work & labor so done and performed by him
upon & about said Mills or tenements at the special instance
& request of the said defendants was reasonably worth the
just & full sum of five hundred & twenty dollars, and your
petitioner reasonably desired to have the said sum of money
of & from the said defendants therefor; and that the said sum
of money was due & payable by & from the said defendants
to your petitioner on or about said twenty ninth day of May
A.D. 1845 at which said time, to wit, on said twenty ninth

day of May A.D. 1845, at the County aforesaid a balance was
stricken between the said defendants & your petitioner, and the said
defendants then & there admitted & acknowledged that the work
& labor of your petitioner so bestowed, as aforesaid was worth
the just & full value of five hundred & twenty dollars as aforesaid;
And the said defendants, having before that time paid to
your petitioner in money & merchandise the sum of one
hundred and twenty two dollars & twenty four cents, then &
there gave their promissory note to your petitioner & thereby
promised to pay to your petitioner or bearer three days after the
date thereof the sum of three hundred & twenty seven dollars
and twenty six cents with interest, the said sum in said prom-
issory note specified as aforesaid being the balance then & there
due & payable from and by the said defendants to your petitioner
out of the whole sum of five hundred and twenty dollars at
first due your petitioner for his said work & labor bestowed
upon said mill as before mentioned; And that at the time of
the delivery of said promissory note by the defendants to your
petitioner your petitioner received and accepted the same as evi-
dence of indebtedness only and not as payment or an extin-
guishment or modification of the debt due from said defendants
to your petitioner, And further that your petitioner had not at
any time hitherto assigned, endorsed, nor transferred the said
promissory note of the said defendants, (but now brings the same
into court here ready to be cancelled) and delivered up to the
said defendants; And further that the said sum of three hundred
and twenty seven dollars and twenty six cents with interest,
in which said sum the said defendants as aforesaid acknowl-
edged themselves to be indebted to your petitioner, or any party
thereof had not been paid to your petitioner by the said defendants
nor either of them (nor by any other person for them, except the
sum of fifty two dollars which was paid to your petitioner on the
fourteenth day of June A.D. 1844; And so your petitioner avers

(3)

Receipt

Stephen Chapman

Of the Supt. Court of the Co. of Clatsop
Circuit Court A.D. 1845

Harvey Colburn & Milo Kelly

parties under the style of

Kelly & Colburn

vs. Charles Perkins

Plaintiff

for the above named defendants according to the foregoing
petition in this cause, returnable at the next term.

Damages five hundred dollars

Wm. Roberts for Clerk

Filed August 1st 1845. Wm. Roberts Clerk

Summons

(4)

State of Illinois

Clatsop County

Sh. The people of the State of Illinois to the Sheriff
of said County Greeting

That we command you that you summon Harvey Colburn & Milo
Kelly parties doing business under the name of Kelly & Colburn
if they shall be found in your County personally to be & appear
before the Circuit Court of said County on the first day of the
next term thereof, to be holden at the Court House in Oregon
in said County on the fourth Monday of September next to an-
swer unto Stephen Chapman in a plea of petition for mes-
sage, to the damage of the said plaintiff as he says in the
sum of five hundred dollars.

And I am you that there this writ with an endorse-
ment thereon in which manner you executed the same.

Witness Myself Henry Roberts, Clerk of said County
at the seat thereof at Oregon in said County
this 1st day of August in the year of our Lord
one thousand eight hundred forty five
Henry Roberts Clerk

(5) Sheriff's Return

Served the within summons by reading in the presence and hearing
of Harry Colburn and Milo Kelly on the 1st day of August 1846
Shiffs. Just \$ 2.12 1/2 W. Starr & Co. Shiffs

Defendants' Answer

(6)

County Court, Eagle County, (May 1st 1846)

Alfred Chapman v Harry Colburn & Milo Kelly

And said Harry Colburn & Milo Kelly by Father their
Attys. comes & defends &c. And say that prayer of the petition
of said Chapman ought not to be granted because they say
that the matters & things stated & set forth in said Chapman's
Petition are not sufficient in law to entitle the said Chapman
to the relief prayed for in said Petition & the said Defs. are not
bound to answer thereto.

And the said Defs. show to the Court here the following causes
of demurrer to said Petition.

1st That said petition does not state or set forth the time when
said sum (money) so alleged to be due for said supposed
work & labor of said Chapman was contracted to be paid by said
D^{ts}.

2^d Because it does not appear in said
Petition that the time of completing the contract for said work &
labor was not extended for a longer period than three years
from the time of making the same.

3^d Because it is not
alleged in & by said Petition that the time of payment of said
money was not extended beyond the period of one year from
the time of completing said contract.

4th Because
said petition is in other respects uncertain, redundant & defective
& insufficient.

Wherefore said Defs. pray the judgment of the Court if they
shall be required further to answer thereto.

By Wm. Kelly their Attys.

Filed May 1st 1846 Wm. Roberts Clerk.

(7) *Wm. Mitchell's Petition*
Circuit Court Ogden County May 1. 1844.

To the Hon. J. C. Catron one of the associate justices of the Supreme Court of Illinois, assigns to hold Circuit Court in the next Judicial Circuit.

The Petitioner of said County respectfully shows that your petitioner is interested in the premises described and intended to be sold by a certain petition for a mechanic's lien filed in said Court & now pending therein by Stephen Chapman against Harvey Robbins & Milo Kelly, which premises are thus described, to wit: the north & south quarter of the North East quarter of section (No. 2) in Township No. twenty three north in Range eleven east of the fourth principal meridian containing forty acres, together with water power & flour mill thereon standing. And your petitioner further shows that his interest is that of a mortgage of said premises by virtue of the assignment of two certain mortgages thereof, one executed by said Robbins to Major Chamberlain bearing date June 13th A.D. 1843 to secure the sum of nine hundred & twenty five dollars which mortgage & the said debt or sum of money thereby secured were duly assigned to your petitioner by said Chamberlain on fifth day of September 1844, & both the mortgage & assignment are duly acknowledged & recorded with the records of Deeds of said County, also by virtue of another mortgage bearing date the 24 day of July 1843 made by Francis Lee to said Chamberlain to secure the sum of nine hundred dollars which mortgage & debt were duly assigned by said Chamberlain to your petitioner on the said 5th of September 1844 & both said mortgage & assignment duly recorded with the records of Deeds of said County, and your petitioner further shows that both said mortgages are still in full force & in no way satisfied, but the several sums of money mentioned & secured by said mortgages are wholly due & unpaid, wherefore your petitioner prays that he may become a party to said process or suit for a lien in said premises, and that the

rights of your petitioners may not be affected by said petition of said Chapman or the proceedings under it, but the rights in equity is within said premises being the only interests or rights therein which said Chapman & Kelly had at the time of making the contracts with said Chapman as by this petition appears may alone be subject to the lien provided for by said Chapman & for such other & further relief as to law & justice may seem meet, as in duty bound we ever pray

Moses Kittleton Pr

W. W. Fuller his Solr

Filed May 4th 1846 Arny Roberts Plt.

(8) Order of Court.

Stephen Chapman
vs.

May Term 1846

Ret. for Lin

Harvey Colburn & Milo Kelly

It being made to appear to the Court by petition that Moses Kittleton is interested by being mortgagor of the premises mentioned & set forth in plaintiffs petition in this cause. It is ordered by the Court that plaintiffs petition be so amended as to make the said Moses Kittleton a party defendant to this suit.

(9) Supplement or amendments to the original bill attached thereto.

Chapman

vs. Colburn

And by way of further supplement & amendment to the foregoing petition, in pursuance of the order of Court, your petitioners hereby pray that the said Moses Kittleton may be made a party defendant hereto as claiming an interest in the aforementioned & described premises, and the said Kittleton be required to answer your petition's foregoing bills of complaint accordingly.

W. W. Fuller

(10) Order of Court

Stephen Chapman

Ret. for Lin Sept. 1. 1846

vs. Harvey Colburn & Milo Kelly

And now at this day comes on to be

Hears the demurrer of the defendants to the plaintiff's petition herein, and after the arguments of counsel and the same having been fully heard, and the Court fully advised, petitions said demurrer and thereupon on motion of plaintiff is granted by the Court to amend his petition.

Affidavits.

(11) Stephen Chapman } Residing in Circuit Court of said County
vs. } Sept. 1. 1846
H. Colburn & M. Kelly }

H. A. Mifflin Attorney for said defendants first being duly sworn on oath states that he is informed by said defendants & verily believes that they have a good & valid set off against the demands or note of said Chapman said on in this suit, amounting in all to the sum of one hundred dollars & upwards - And that the attorneys of said defendants cannot safely proceed to the trial of said case in the absence of said defendants - And this affiant further says that both of said defendants are sick & confined at their respective residences in White Oak Grove this County - and are utterly unable to attend the present term of this Court as this affiant has been informed & believes.

Subscribed & sworn to before me
this 2nd September 1846

H. A. Mifflin

Henry Roberts C. C. C.

Filed Sept. 24th 1846

Henry Roberts C. C. C.

(12) Petition for change of venue

Stephen Chapman

vs.

Harvey Colburn & M. Kelly

State of Maine }
of said County }

vs.

Petition for change of venue
County Circuit Court Sept.
1846.

To the Hon. John D. Eaton Judge of

Signed to hold Circuit Court in said
County & in the ninth Judicial Circuit

(14) Orders of Court. In the County Circuit Court,
Stephen Chapman, Plaintiff vs. Harvey Colburn & Milo Sully, Defendants.
April Term 1847. Tuesday April 15th 1847.

Harvey Colburn & Milo Sully, Defendants } This day came John said before
doing business under the style of } said by Fuller their attorney &
Sully & Colburn } a do entered his motion that Moses
Kittleton have leave to become a party to this suit.

Also this day came the said Plaintiff by Patrick his attorney and
his motion it is ordered by the Court that the said plaintiff
have leave to have the certificate of the Clerk of the Circuit
Court of Eagle County, to the transcripts & papers transmitted in
this cause amended by said clerk.

Remains

(15) Stephen Chapman } Petition for Mechanics Lien. Of
vs. } the April Term of the In County
Harvey Colburn & Milo Sully } Circuit Court, A.D. 1847.
parties to & Moses Kittleton Mortgagee.

And the said Plaintiff by Pat-
rick his attorney for answer to the petition of the said Moses Kittleton
says that the prayer of said Kittleton's ^{petition} ought not to be granted in man-
ner & form as the same is prayed, because he says that the said peti-
tion & the matter & things therein alleged are not sufficient in law
to warrant the granting thereof in manner & form as the same is prayed
for the following reason, to wit, said petition prays that the lien of the
said plaintiff may attach only upon the right of said Sully & Colburn
to redeem said lands with the appurtenances from the incumbrances in
said petition mentioned &c. to wit, which would be contrary to the
statute in such cases made & provided in and that said petition of said
Kittleton is in other respects defective informal & insufficient.

Whereupon the said plaintiff prays judgment & his costs &c.
Dated April 14th 1847 at St. Charles Mo. J. B. Patrick for Plff.

Order of Courts.

(16) August Term 1849 Sunday August 17. 1849

Stephen Chapman.

vs.

Charles Kelly & Harry Colburn partners

doing business under the style of Kelly & Colburn

& Moses Mitchellson

This day came the said plain-

tiff by Henry & Irving his at-

torneys and on their motion

it is ordered by the Court

that the said defendants file

their answers to the said plaintiff's petition in this cause by two o'clock
P.M. of this day.

Answer of Charles Kelly.

(17) In County Courts Courts Aug. 1. 1847

Stephen Chapman vs. Harry Colburn

Charles Kelly & Moses Mitchellson

Petition for a Lien

Charles Kelly one of the defendants above named having, after ad-
vantage of inspection to the many defects uncertainties & ~~infirmities~~
set in said petition for answer to so much thereof as he is ad-
vised to be requisite for him to answer says that it is not true
as set forth in said petition that said Chapman contracted or bargain-
ed with this Respondent on or about the first of August 1844
to perform the work & labor on the flour Mills in said petition
mentioned, nor at any other time, that this Respondent was not the
owner nor has he any interest in the parcels of lands & Mills describ-
ed in said petition on or about the said first day of August
1844, nor for a considerable time thereafter, & he did not become
interested in said lots of lands or Mills till after said Chapman
has begun to work thereon, and this Resp^t has been informed &
believes to be true that said Chapman began said work upon
said Mills under a contract with David F. Cable who claimed
to own said lands & mills on or about said first of August 1844,
and that said Chapman was not apprised by this Respondent of the
fact that this Resp^t had as good as an interest in said Mills

till October 1844. And this Respondent further says that the bargain between said Cible & sd. Chapman under which said Chap-
man performed said work on said mill, was as he has been informed
believes that sd. Chapman should receive two dollars & a half a day
for his work during summer and two dollars during winter, and
this Resp^t says that said Chapman worked as much as three months
according to the recollection of this Resp^t during the winter season
of 1844 & 1845 upon said mill, for which according said contract
with Cible said Chapman was not entitled to receive more than two dollars
per day. And this Resp^t further says that it is true that he & said
Colburn made a note to said Chapman as set forth in the petition
in consideration of the work done by sd. Chapman upon said mill
under said contract with sd. Cible, but at the time of giving
signing said note neither this Respondent, or said Colburn (as this
Resp^t believes) had no knowledge that said work was done under an-
express contract that the sd. Chapman was to receive only two dollars
per day during the winter season, and said Chapman claimed to receive
two dollars & a half a day for all the time that he worked on said mill
and the same was allowed him at that rate, thus the mistake of this
Resp^t & said Colburn as to the description of sd. Chapman. And this
Resp^t says that the work ~~done~~ said Chapman upon said mill
was not worth over two dollars per day during the winter season.

And this Resp^t further answering says that he and said Colburn
have made divers payments on said note amounting to fifty two dol-
lars which payments were made about the month of July A.D. 1845
which sum is distinct from the sum named in said petition as credit
for said work of sd. Chapman, and also that he & said Colburn
have also paid off against said note amounting to the
sum of sixty five dollars & forty cents, a part of which is assigned to this
cause & marked A. And this Respondent makes said bill a part
of this answer, which items of debt are fully due from said Chapman
to said Colburn & this Respondent & they claim to have the same allowed
to be set off against said note & that the same was not included in the sum
named in said petition as credited to sd. debt. by said Chapman, - And this

Respondent further says that the note on said Petition mentioned was made too large by the sum of forty five dollars by reason said Chapman charging fifty cents per day for his work in the winter season more than he was entitled to receive according to his bargain with said Noble, & that Respondent & said Colburn were induced to give a note of that amount by the description & false representations of said Chapman, and that Respondent claims to have the said sum of forty five dollars & amounts credited on said note, And that Respondent further Answering says that on about the 18th day of September 1844 he made export & delivery to Timothy J. Willard of Ottaum Mr. Noble a deed of Mortgage of two undivided thirds parts of the parcels of land named in said petition & also Mills & other buildings thereon to secure the payments of his note for three hundred & eighty dollars as by said Mortgage will appear which Mortgage was duly acknowledged and recorded, and that the amount of said note & interest is still due & unpaid & amounts now to the sum of four hundred & forty two dollars.

And having fully answered said Petition this Respondent prays judgment of the court thereon ought to be allowed & that the same may be dismissed.

Subscribed & sworn to before me

Philip Kelly

this 17th day of August 1847

C. J. Chase Clerk

Filed August 17th 1847

C. J. Chase Clerk

[A] Bill of particulars set off & mentioned in the answer

(Mr. Stephen Chapman to Colburn & Kelly Dr.

To balance due on book a/c.	\$ 6.40
" Boards & boarding when sick - 3 weeks at \$3.	9.00
" Damage done stacks of oats which you promised to pay	6.00
" 9 months horse keeping - hay & grain - at 8/ per wt	39.00
" Time spent in hunting horse which you promised to pay	5.00
" Cash paid last July	53.00
	\$ 107.40
	65.40

Answer of Moses Wettherton.

(19) State of Illinois & Circuit Court August Term 1847
La. County
Stephen Chapman v. Harvey Colburn, & Mike Kelly partners
vs. And. Moses Wettherton Defts.

Moses Wettherton one of the defendants above named comes in his own person, & showing all advantage of exception to the (many) defects unascertained & insufficient in said Chapman's Petition (which) under threats or to procure thereof as this Respondent is advised is material to be answered by him, as follows to wit, This Respondent says that on the 5th day of September 1844 he took an assignment in due form of law for an adequate & valuable consideration of (Major Chamberlain of two certain Mortgage Deeds one of which Deed was executed by Francis Lee to said Chamberlain & dated July twenty six A.D. 1843 conveying to said Chamberlain & his assigns two undivided thirds parts of the parcel of land described in said Chapman's Petition together with the Mills & other Buildings thereon situated, and being the two undivided thirds parts of the North west quarter of the North east quarter Section No twenty seven in Township No twenty three of Range Eleven East of the Third Principal Meridian to secure the payments of nine promissory notes signed by said Lee & David D. Cable to said Chamberlain one for one Hundred & twenty five Dollars & eight for one Hundred Dollars each all bearing date aforesaid first A.D. 1843 with interest at six per cent from their date and the eight last mentioned notes were then & there duly assigned to this Respondent by said Chamberlain & then & there delivered to this Respondent, on which said eight notes, there is now due the sum of one Hundred & fifteen dollars & five cents, to secure the payments of which this Respondent holds the said Mortgage so made by said Lee & assigned by said Chamberlain to this Respondent as above stated, the other mortgage Deeds above named & assigned by said Chamberlain

to this Respondent as above sets forth. and said deed date the
fifteenth day of June 1844 ^{AD} and was duly executed & delivered
by said Harry Colburn to said Chamberlain & his assigns convey-
ing to him in Mortgage one undivided third part of said parcel
of land with the Mills and other Buildings thereon to secure the
payments of nine promissory notes made by said Colburn to said Cham-
berlain all bearing date April 1st 1843 one for one hundred and twenty
five dollars & eight for one hundred dollars each, all bearing
interest at six per cent from their date, all said notes were then &
are duly assigned & delivered by said Chamberlain to this Respondent
& to secure the payment of which said notes or the balance now
due upon them which amounts to the sum of three hundred &
forty two dollars & fifty six cents including the interest, this respon-
dent now holds said last mentioned Mortgage Deeds & the assign-
ment thereof and this Respondent further averring says that
at the time of making & executing said Mortgage Deeds said Lee
& Colburn were the owners of said parcel of land & the buildings there-
on in fee simple & duly authorized to make & execute said Mortgage
in manner as above mentioned, both which Mortgage Deeds were
duly acknowledged & recorded in the Agle County Records of Deeds
& Conveyances according to Law, all which notes and Mortgages
this Respondent brings into Court & relies on & makes a part of this
answer.

And this Respondent further averring says that at the time
said Mortgage Deeds were executed & delivered as aforesaid
there was upon said premises the floor Mills mentioned in said
Petition which Mills was then enclosed sided & shingled & made
of the floors laid and also the & the Posts or frame for the stones
to run on was mostly made water wheel mostly made & two pair
of 12 in stones & having clothes & mows of the iron to run said
Mills, were all in or near the mill ready to be placed therein and
the upper & Pitt wheels used in said mill was nearly completed,
all which Materials & work had been done before said Chamberlain be-
gan to perform any work on said mill, as its faith is said Chamberlain

Moses Petition

Subscribed & sworn to before me

this 16th day of August A.D. 1847

C. J. Chase Clerk

Filed August 17th 1847

C. J. Chase Clerk

Moses Pettitton

(20) Replication to answer of Milo Kelly.

J. Chapman

vs.

Kelly & Colburn & Pettitton

Replication of J. Chapman to the
answer of Milo Kelly one of the respon-
dents.

This Replicant saving & reserving to himself all exceptions to
the insufficiency of said answer for replication therunto saith,
that he will aver & prove his said petition to be true, certain & suf-
ficient to be answered unto, and that the said answer of the said
defendants is untrue, uncertain & insufficient to be replied unto
by this replicant, without this, that any other matter or thing
whattsoever in this said answer contains material or official to
be replied unto compelled & avoided, traversed or denied, is true,
all which matters & things this Replicant is & will be ready to aver
and prove as this Court shall direct, and humbly prays as in
and by his said petition he has already prayed

Patrick Kew & Dwyer

Atty. for Petitioner

Filed August 18th 1847

C. J. Chase Clerk

(21) Replication to answer of Moses Pettitton.

J. Chapman

vs.

Kelly Colburn & Pettitton

Replication of J. Chapman to the an-
swer of

Pettitton

This Replicant, saving & reserving to himself

all exceptions to the insufficiency of said Answer, for Replication
thereunto saith that he will aver and prove his said petition to be
true certain & sufficient to be answered unto, and that the said
Answer of the said Defendant is untrue uncertain & insufficient
to be replied unto by this Replicant, without this, that any other
matter or thing whatsoever in the said Answer contained material
or effectual to be replied unto confided & avoided, traversed or
denied is true; all which matters & things this Replicant avers,
& will be ready to aver & prove as his Court shall direct, &
humbly prays as in & by his said petition he has already
prayed.

Robert B. Knox & Son
Attys. for Petitioner

Filed Aug 26th 1847
C. S. Chas. Chitt

+ I Affiants:

(22) In County Cirante County August 1st 1847
Stephen Chapman vs Harry Bellum (Milo Kelly & Moses
Chittleton Defts.

Relator for Lien

(Milo Kelly one of the Defendants above
named on his oath states that he cannot safely go to trial of said
cause without the testimony of David T. Cable, that he expects to
prove by the testimony of said Cable that the work performed by
said Chapman on said Mill was begun under a bargain between
said Chapman & him some time prior to the first of August 1844,
at which time that said Cable was in possession of said Mill & land
mentioned in said petition & claims to be the owner of it, and that
said work was continued under said contract without any new
contract until about the first of November A.D. 1844, about which
time said Cable quit said premises, and that by that bargain said
Chapman agreed to work on said Mill during the winter months

for the sum of two dollars per day and during the summer season
for two dollars & fifty cents per day, and that said cable is the only
person known to this affiant by which the above facts can be proved.

And this affiant further says that said cable left this part
of the state about the first of December 1844 & went to parts un-
known to this affiant & has never since returned. That this af-
fiant after the bringing of this petition had made frequent enqui-
ry to ascertain the place of residence of said cable, with an inten-
tion of taking his deposition to be used as evidence in this suit,
but that this affiant notwithstanding his efforts to find said cable
has not been able to find him in season to have his deposition taken
to be used at this term of the court; but that this affiant has
within a week before the commencement of this court got information
that said cable resides in the territory of Wisconsin between Sheboy-
gan & Chicago, & that this affiant believes that he shall be able
to procure the deposition of said cable in season to be used at the
next term of this court, and this affiant further states that this
application for a continuance is not made for delay but to obtain
a fair trial of said suit.

Subscribed & sworn to before me

(M. Kelly)

this 17th day of August 1847

C. J. Chase Clerk

Filed Aug. 18th 1847

C. J. Chase Clerk

(23) Order of Court.

Stephen C. Chapman

vs.

Milo Kelly & Harvey Kelly as partners doing
business under the style of Kelly & Kelly
and Moses Kittleston.

Wednesday August 18th
1847

This day came the said
defendants by their then
attorney and entered his

motion for a continuance of this cause to the next term of this
court for reasons in an affidavit on file with the court, and after due
deliberation on said motion, it is ordered by the court that the

same be overruled.

And afterwards came the said Plaintiff by Knox & Ingham and Patrick his attorneys and on his motion and it appearing that the said Harry Colburn had not filed his answer to the said plaintiffs petition in this cause as required by a rule of this court, but that he had made default, it is therefore ordered by the court that the said plaintiffs petition be taken for confessed as to the said Harry Colburn.

(Verdict of Jury.)

(24)

On the undersigned Jurors in the case of Chapman vs. Colburn & others do find the issues for the plaintiff and assess his damages at the sum of three hundred thirty one Dollars and fifty one cents.

Given Aug. 11th 1847.

Mathias F. Garrison

Lewis Bridgman

Hubbard Eels

Wm. H. Martin

John Fry.

Reuben Eastwood

Alvan F. Under

Chas. L. Loveland

John R. Smith

Thurman Collins

Wm. J. Benjamin

Chamney Reed

(25) Instructions of the court on the part of the defendants.

The court is requested to instruct the jury that if they believe from the evidence that the work & labor done by Chapman on the mills mentioned in their petition, was done under a contract between said Chapman & David J. Cable, the law in the case is with the Defs. & no right of Lien is made out.

2^d That if the jury believe from the evidence that a part of the labor mentioned in said petition was done under a contract between said Chapman & Cable the said Chapman has no right of Lien for that part of the labor so done.

Given

3^d That the answer of Kelly and is evidence is evidence of the pte. off. in the absence of other proof to contradict it of the amount of said pte. off.

On the part of Plaintiff

1st If the jury believe from the evidence that the Defts. entered into the contract through Cable, placing themselves in this situation, or that the work was done under a subsequent contract made by them, is sufficient evidence of the contract as laid in the complaint.

2^d That the answer of a defendant respecting a pte. off. contradicting the sworn declarations of the complainant is not conclusive but may be overthrown in a variety of ways, among which are these, that the Defts. making such answer may be shown to have sworn falsely in that & other portions of his answer, or that the whole of said accounts have since been settled, & satisfactorily acknowledged by the same individual to be just & right.

Order of Court.

(2nd) ^{1st} Tuesday August 19th 1847

Stephen Chapman

Milo Kelly & Mary Colburn partners
doing business under the style of Kelly & Colburn } Change of names
and Miles Nettleton

This day came the said Plaintiff by Ruoff & Brown and Patrick H's Attorneys; And the said Defendants Milo Kelly and Miles Nettleton by Fuller their Attorney, and issue being joined between the said parties, thereupon by the direction of the Court, came a jury of good & lawful men to wit, William M. Marden, Thurman

Collins James Bartlett Richard B. Loveland, Hubbard
Els Matthias F. Garrison William J. Benjamin John Fry
Chapman Esq. Hiram Fruder Rubin Eastwood & Lyman
Bridgman, who being duly sworn tried & sworn to try the
issues joined between the said parties, and after having heard
the evidence as well on the part of the said Plaintiff as on
the part of the said Defendants retired to consider of their
verdict, and afterwards they returned into court the follow-
ing verdict, to wit: "In the undersigned jurors in the case
of Chapman vs. Kelly and others do find the issue for the plain-
tiff and assess his damages at the sum of three hundred & ninety
one dollar, and sixty one cents."

Whereupon the said plaintiff's Petition having been thereupon
taken for confessed as to the said Harvey Colburn it is or-
dered and considered by the court, that the sum as prayed for
by petitioner attack and that a special execution issue for the
sale of the said premises, to wit: a certain lot or tract of
land situate lying and being in the County of Cook, and State
of Illinois and described as the North west quarter of the North
East quarter of Section Number Twenty seven in Township
Number Twenty three of Range eleven East of the fourth prin-
cipal Meridian, to satisfy the said sum of three hundred
and ninety one dollar and sixty one cents, the said plaintiff's
damages by the jurors aforesaid in the form aforesaid assessed,
together with his costs and charges by him abouts this suit in
this behalf expended, and that the overplus (if any there be)
after the satisfaction of the said damages and costs and charges
be paid to the parties who may be entitled to the same;
And it is further ordered that the said Moses Mettleton
upon payment of costs go hence without day.

State of Illinois }
In County }

ss. I Charles T. Chase Clerk of the
circuit courts in & for said County
of Ill. do hereby certify that the foregoing Copies (numbered
from one to 26 inclusive are a full true perfect &
correct transcript from the Records of said County of
proceedings had therein in the above mentioned Cause
of Stephen Chapman vs. Philo Kelly & others as appears
from the records of said County ~~and~~ in said Cause and
the papers on file in the same so full & entire as the
same remain in my office

In Testimony Whereof I have hereunto
affixed my hand and the seal of
said County at Dixon in said County
of Ill. this 24th day of September in
the year of our Lord 1887.
Charles T. Chase Clerk

Milo Kelly et als. — } Abstract of record.
Daniel Chapman admr. } Error to Lee Co.

Transcript from Ogle Co.

Sept. 21st 1846. It having been made to appear to Court, that Moses Nettleton is interested as mortgagee, ordered that plff's petition be ~~so~~ amended as to make him a party.

Demurrer to petition by defendants heard — demurrer sustained — leave to amend — (no means of ascertaining whether any or what amendment made &c.)

Venue changed to Lee County Sept. 25th 1846, transcript of record & original papers forwarded by Clerk. (Affid^t not put on file)

Petition filed in the Ogle Court by com. pt. Augt. 1st 1845 — as follows —

Petitioner abt. Augt 1st '44 made verbal contract with Milo Kelly & Harvey Colburn the then owners of &c. (land described) to work in erecting a mill on the land.

Augt 1st '44 commenced work & continued most of the time till about 29th of May 1845 — worked 208 days —

Defendant promised to pay what the work reasonably worth —

No particular amount of work agreed to be done, nor at any particular price.

Work reasonably worth \$520.

May 29th 1845 balance found due of \$397.76 & note given as evidence of indebtedness only not as payment.

Note not indorsed & now brought into Court to be cancelled & delivered up to clfts.

None of said note paid except \$52.00 paid June 14th '45, which leaves a balance of \$350.00 or thereabouts at date of filing petition - Still due & owing by clfts. to Petitioner.

Wherefore as six months have not elapsed from time of completion of work, petitioner prays that he may have the benefit of a mechanic's lien & that the same may attach on said land & mill & that petitioner may have judgment for said debt and interest from May 29, 1845 & that a special execution may be awarded.

Preceipe for Summons & for Subpoenas
Supplemental }
Petition } "And by way of further Supplement
& amendment to the foregoing petition
in pursuance of the order of Court, your
petitioner hereby prays that the said
Moses Nettleton may be made a party

defendant hereto as claiming an interest
in the aforementioned & described premises,
and the said Nettleton be required to
answer your petitioners foregoing
of complaint accordingly,

S. G. Patrick for plffs.

The same is docketed filed Aug. 1st 1845

Henry Roberts Clerk.

Affidavit of S. G. Patrick that he understood
& believed that Colburn's name was
Henry - did not discover that it was
Harvey till after petition filed - had
the mistake rectified in the summons
before it was served - Sworn to & filed
Sept. 23. 1845.

Demurrer of Colburn & Kelly by Fuller atty.
to petition - The demurrer is entitled
Ogle Co. May Term. 1846 - no filing.

Affidavit of Mix for a continuance at
Sept. Term. 1846. (no action in relation to it)

Petition of Moses Nettleton to be made a party
so that his rights may not be affected
The petitioner claims to be a mortgagee
of the premises by mortgages senior to
the mechanic's lien - Petition filed May
4th 1846.

Demurrer to this petition by Patrick for
plffs - joined by Fuller for deft. Nett-
-ton - This on the 14th of April 1847.
(No attention seems to have been paid
to this demurrer by the Court)

Motion that Nettleton be made a party
made by Fuller for Nettleton April
13th 1847. (This seems to have been done
in May 1846)

On motion of plff. by Patrick ordered that plff
have leave to have the Certificate of
Clerk of Ogle Co. to transcript & papers
amended. (It does not appear what was
done on this subject)

Rule for an answer by defendants by
2 O'clock - Aug 17th 1847.

Answer of Kelly filed August - 17th 1847
as follows (Sworn answer)

Not true that plff. bargained with
respondent on or about Aug. 1. 1844.
Respondent had no interest till after
work had been commenced.

The bargain under which work
was done was under a contract between
plff & D. D. Coble who claimed to own the
mill & land.

Plaintiff not apprised that respondent
had any interest till Oct. 1844.

Bargain between Coble & plff, was as respondent is informed that plff. should have \$2,50 per day in summer & \$2,00 in winter.

According to best recollection of respondent plff. worked in winter 3 months.

Note given - did not know at time that plff. was to receive only \$2,00 in winter - \$2,50 allowed for whole time through deception of plff.

Work not worth over \$2,00 per day during winter - Claims payment & set off to amount of \$117,40. Account filed with answer - This amount not credited in petition -

Note given for \$45 too much on account of fraud of plff.

On the 18th Sept, 1844, Respondent mortgaged premises to J. S. Williams to secure \$380,00. Amount still due & unpaid.

Genl, Replication Aug 18th /47.

Answer of Pettleton filed Aug. 17th 1847.

The answer sets up two mortgages - one from Tice & the other from Capt. Colburn - Both to Chamberlain & assigned by him to defendant Pettleton. The Tice mortgage bears date Feb. 26, 1843. The Colburn one bears date

June 15th 1844. (The amount due on the mortgages exceeds \$2000 at time of filing answer.)

The answer states that the mortgages were owners at time of execution - The Tice one was of $\frac{2}{3}$ of the premises & the Colburn one of $\frac{1}{3}$ of the premises in petition. The answer refers to & makes the original mortgages a part of it. (The mortgages are not set out in full in the record)

General replication filed to this answer Aug. 18, 1847. (Common form of a charging replication)

Motion August 18th 1847 for a continuance - motion overruled -

Default of Colburn for want of an answer
Bill taken for confessed as to him.

Decree

(Aug 19, 1847)

This day came the said Plaintiff by Knox & Drury & Patrick his attorneys and the said defendants Miles Kelly & Moses Nettleton by Fuller their atty. & issue being joined between the said parties thereupon by the direction of the Court came a jury of good & lawful men, to wit, (names) who being duly elected, tried & sworn,

to try the issue joined between the
said parties, And after having heard
the evidence as well on the part of
the said Plaintiff as on the part of
said defendants retired to consider
their verdict & afterwards they
return into Court the following
verdict to wit; "We the undersigned
jurors in the case of Chapman vs. Kelly
& others do find the issue for the plaintiff
and assess his damages at the sum of
\$391. 61 - Three hundred ninety-one dollars
and sixty one cents - Whereupon the
said plaintiff's petition having been
heretofore taken for confessed as to said
Henry Colburn, it is ordered & considered
by the Court that the lien as prayed for
by petition ~~be~~ attached & that a
Special Execution issue for the sale
of said premises, to wit; a certain lot
or tract of land situate, lying and being
in the County of Ogle & State of Illinois
described as the north west quarter of
the north East quarter of Section No.
Twenty Seven in town twenty three
north of Range eleven east of the
fourth principal ~~meridian~~
Meridian to satisfy said sum of
\$391. 61 the said plaintiff's damages
by the jurors in form aforesaid assessed,

together with his costs & charges by
him about this suit in this
behalf expended, and that the
overplus, if any there be after
the satisfaction of the said damages & costs &
charges be paid to the parties who may
be entitled to the same. And it is
further ordered that the said
Moses Nettleton upon payment
of costs go hence without day.

Lee.
Kelly et al.,
vs,
Chapman admr, &
District.

filed July 6th 1852.

State of Illinois }
Cassida County } Ch. Supreme Court of the State of Illinois, Second
Grand Division,

(Milo Kelly) (Moses Kittelson et. al. p[er]s[on]s, in Error
et. al.

Daniel Chapman administrator of Estate of
Stephen Chapman decd., Ift. in Error,
Thos. H. Patrick and William M. Hutton being first duly
sworn say that they were the solicitors for the complainant Stephen
Chapman on the trial of this cause in the court below, that the
^{transcript of the} records filed in this cause in this court, is not a true copy of the
records and proceedings in said cause as originally filed and laid
in the court below; that said ~~transcript~~ ^{transcript} is not correct in this, that
no petition ~~and~~ ^{or} affidavit for a change of venue is set out in the ~~transcript~~ ^{transcript}
on file in this court, whereas there was a petition duly subscribed and
sworn to for a change of venue filed by the complainant in the
Cassida County Circuit Court, where this case was originally commenced,
and a change of venue ordered to Lee County where said cause was
tried; Also the ^{transcript of the} records in this cause show that certain mortgages & notes
referred to in the answer of Moses Kittelson one of the defendants in the
court below, were filed and attached to said answer and made parts
thereof in the court below whereas in fact no mortgages or notes were
ever filed in said cause or attached to said answer, we having
frequently seen and examined said answer and the papers in said
cause both before and since the trial thereof in the court below;
and also knowing that William M. Fuller Esq. the solicitor for said de-
fendants brought said mortgages into court on the trial below, and that
owing to some objection being raised to their going to the jury we did
not give them in evidence but took them away with him; since which

time we have not seen them appear perhaps on the files of the Eagle County
Circuit Court when suits have been brought upon them in the name of
James C. Cale as assignee of said Pettibone, and that we never saw said
notes; And we further state that we have searched recently among the pa-
pers on file in the Lee County Circuit Court for said petition for a change
of venue and cannot find either that or the original summons in said
cause & believe both to be lost; said papers in said case having been for
several months immediately previous to the certifying of the records on file
in this Court abstracted from the office of the clerk of said Lee County
Circuit Court and as ~~affirm~~ deponents are informed and believe in
the possession of one Henry D. Mix of Oregon, Eagle County, who procured and
caused to be filed the records now in this Court in this cause; and since
the return of said papers to the files of said Lee County Circuit Court,
said summons and petition for change of venue cannot be found; also,
that said ^{transcript of the} records on file in this Court is otherwise imperfect and in-
correct in the leaving out and changing ^{a number of} ~~some~~ words in copying the
papers in said cause; We further state that the copy of the records
of said cause hereto attached is according to the best of our knowl-
edge recollection & belief, correct; that the same has been compared with the
original papers by this deponents M. Patton and Charles McChase then
the clerk of said Lee County Circuit Court, who was the clerk thereof
and present at the time of the trial in said Court, and said records were
then and there found correct and duly certified to be so by said clerk
as will appear by reference thereto

Subscribed & sworn to before me

this 30th day of June 1852

J. Seland Clerk.

By J. W. Seland Deputy.

Shepard C. Patton
W. W. Stratton

STATE OF ILLINOIS, }
Supreme Court.

The People of the State of Illinois,

To the Sheriff of the County of *Ogle* Greeting:

BECAUSE in the record and proceedings, and also in the rendition of the judgment of a plea which was in the circuit court of *Lee* county, before the Judge thereof, between *Stephen Chapman* plaintiff, and *Milo Kelly, Harvey Colburn and Moses Nettleton*

defendant, it is said that manifest error hath intervened, to the injury of the said *defendants*

as we are informed by *this* complaint, the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the state of Illinois, at Ottawa, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to ~~the said~~ *Daniel Chapman the Administrator of said Stephen Chapman, lately deceased*

that *he* be and appear before the justices of our said supreme court, at the next term of said court, to be holden at Ottawa, in said state, on the *Second Monday* in *June* next, to hear the records and proceedings aforesaid, and the errors assigned, if *he* shall see fit; and further to do and receive what said court shall order in this behalf; and have you then there the names of those by whom you shall give the said *Daniel Chapman* notice, together with this writ.

Witness, the Hon. SAMUEL H. TREAT, Chief Justice of our said Court, and the seal thereof, at Ottawa, this *twenty fourth* day of *May* in the year of our Lord one thousand eight hundred and fifty *two*.

S. Leland

Clerk of the Supreme Court.

By *P. H. Leland* Depy. Clk.

No 10 Wells et al.

Daniel Chapman
Adm'r of Stephen Chapman

Dei. fa.

Filed June 26th 1852
J. S. Chapman
J. S. Chapman

Amount due June 26th 1852
\$1.00
0.10
0.40
0.50

Amount due June 26th 1852
\$1.00
0.10
0.40
0.50
Total \$1.00

State of Illinois, set.

WRIT OF ERROR—FREE TRADER PRINT.

The People of the State of Illinois,
To the Clerk of the Circuit Court for the County of *Lee* GREETING :

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of *Lee* county, before the Judge thereof, between

Stephen Chapman plaintiff and *Milo Kelly, Harvey Colburn, and Moses Nettleton*

defendant^s, it is said manifest error hath intervened, to the injury of the aforesaid *defendants*, as we are informed by *their* complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plea aforesaid, with all things touching the same, under your seal, so that we may have the same before our justices aforesaid at Ottawa, in the county of La Salle, on the *Second Monday in June* - next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. SAMUEL H. TREAT, Chief Justice of our said Court, and the seal thereof, at Ottawa, this *twenty fourth* day of *May* in the year of our Lord one thousand eight hundred and fifty *two*,

S. Leland Clerk of the Supreme Court.
By *S. H. Leland* Depty. Clk.

Milo Kelly et als.
vs.

Daniel Chapman Adm^r

Writ of error —

Filed May 24, 1852,
S. Leland Clerk,
By P. H. Leland Esqy.

Wilo Kelley, Harvey -
Colburn, & Moses Nettleton

vs.

Stephen Chapman

Error to Lee.

Decree affd.

Drfts. costs.

Appm. 25, fil. & ent. joinder 30, fil. briefs &c. 25,	80
Mv. for leave to fil. record 25, ent. argt. 25, subn. 25, undr add. 25,	1,00
Ord. Suct. mv. 25, fil. record 15, ord. affy. 25, fil. opm. 5,	70
Ent. judt. & opm. 4,00 copy of judt. 50, Certf. seal 25,	4,75
Judt. 25, ord. for extr. 25, Sh. judt. 25, execution 25,	1,00
Bill of costs 25, copy 25, fil. & Sh. 15, Shffs' return 10,	75
Posty. 25, ent. Satoyn. 25,	50
Amt.	<u>\$ 9.50</u>

A true copy from my Fee Book as taxed &
recorded therein.

[1954-457]

Leland Clerk.
By J. W. Leland Depy.

Miles Kelly stat.

Stephen Chapman

Bill of costs \$ 9.50

Ogle

STATE OF ILLINOIS, ss.

Supreme Court, Third Grand Division, at Ottawa:

The People of the State of Illinois, to the Sheriff of *Ogle* County---Greeting:

We Command You, That of the goods and chattels, lands and tenements, and real estate of *Milo Kelly, Harvey Colburn & Moses Nettleton*

you cause to be made the sum of *nine* Dollars and

fifty Cents costs in the said Supreme Court, which *Daniel Chapman administrator of*
Stephen Chapman deceased

lately recovered against *them* before the Justices of our said Supreme Court, as appears to us of record, and make return hereof in ninety days.

WITNESS, the Hon. Samuel H. Treat, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this *fifteenth* day of *January*, in the Year of our Lord One Thousand Eight Hundred and Fifty-*three*.

S. Seland Clerk of the Supreme Court.
By S. H. Seland Deputy Clerk

Recd. the within per collection No 20th day of January 1st 1853 at
9 o'clock A.M.
Chas. Bates Sheriff Ogden Co
per E. Bert. H. Esq. Clerk

Ogle
Milo Kelly et als.
vs.
Stephen Chapman.

Execution vs. plffs.
Bill of costs — \$9.50
Fee Bill — 21.85
\$31.35

Collect interest from
August 3^d 1852.

Filed July 14th 1853,
L. Leland Clk.
By P. K. Leland Depy.

as soon as collected send
to me by mail oblige
L. Leland

Milo Kelley, Harvey
Colburn, & Moses Nettleton

vs,

Stephen Chapman

Error to Lee.

Decree affd.

Plff's costs.

Fil. record & errors 20, appn. 25, Dr. came 10, writ of error & fil. 55, 1, 10

Sci. fa. & fil. 55, prep. & fil. abetals 7, 50 ent. anyt. 25, 8, 30

Subn. 25, under admt. 25 bill of costs 25, copy 25, Certf. & seal 25, 1, 25

Fil. wh. 15, Shff's utn. 10, Dr. fee 250 Trans. opt. &c. 7, 20 Sate fm. 25, 10, 20

Serv. & ret. Sci. fa. 60, mil. 40, 1, 00

Am't. \$21, 85

State of Illinois, ss.

Supreme Court—Third Grand Division, at Ottawa:

The People of the State of Illinois to the Sheriff of Ogle County, Greeting:

WE COMMAND YOU, _____ that of

the goods and chattels, lands and tenements of Milo Kelley, Harvey Colburn and
Moses Nettleton you cause to be made the sum of twenty one
_____ dollars and eighty five - cents, the amount of the foregoing bill, which
is due and unpaid, and is a true copy from the Fee Book in my office; and hereof make due return
in ninety days.

WITNESS, the Hon. SAMUEL H. TREAT, Chief Justice of our said
Court, and the seal thereof, at Ottawa, this fifteenth
day of January - A. D. 1853.

S. Leland Clerk of the Supreme Court.
By J. H. Leland Depy. Clk.

Cypr-
Milo Kelly et al.
vs.
Stephen Chapman.

Free Bill vs. Jeffs.
Amt. \$21.85.
7m

Filed July 14th 1853,
L. Leland Clk.
By P. N. Leland Dep.

Received the within for collection due 20 days of January 1853
1853 at 9 a'clock
John H. Leland
J. H. Leland at court clerk

Kelly & Chapman

Chapman filed his petition against Kelly & Calburn to enforce a mechanics lien under our Statute. Subsequently, Moses Hettleton, appeared in court, and filed his petition to be made a defendant, in the suit, showing that he had an interest in the premises, as the assignee of two mortgages which were older incumbrances than the Complainant's lien. By order of the Court the petition was so amended as to make him a party. And he answered setting up his mortgage, as in his petition, though more circumstantially. Kelly also answered, traversing a part of the statements of the bill, and also setting up new matters, such as payment, &c. &c. He also states in his answer that he had executed to one Williams a mortgage upon the premises. As to Calburn, the bill was taken as confessed, and replications were filed to the answers of Hettleton & Kelly. At the August term the case was tried by a jury, who found the issues for the plaintiff, and assessed his damages ~~xxx~~^{for} which a decree was entered directing a special execution to be issued for the sale of the premises to satisfy the amount ^{found} due the plaintiff, and the costs. And that the residue of the proceeds of the sale should be paid to the parties who may be entitled to the same, and it is further ordered that the said Moses Hettleton upon payment of costs go hence without day.

Several objections have been urged to the judgment or decree in this case. The first which I will notice is that the record contains no evidence, to support it & that it is uncertain what issues the jury have passed upon. The testimony was delivered in open court before the jury, and from it the jury have passed upon the issues submitted to them, and when that is the case the evidence could only appear upon the record by a bill of exceptions, ^{or a certificate of the judge} as in an ordinary jury trial, and it is the duty of the party who complains of the verdict to preserve the evidence in the record, either by a bill of exceptions or a certificate of the judge so that he might show to this court that the verdict is not supported by the evidence. This is the case whether we regard the trial as in an action at law or a ~~feigned~~ ^{verdict} issue out of Chancery. The ^{verdict} stands in place of the evidence. By it the facts are found upon which it is the duty of the court to pronounce the judgment of the law. The statute itself determines what the issues were which were submitted to, & determined by, the jury. The 7th

section of Chap. 65 R. S. main which this suit was instituted provides as follows; "Defendants in proceedings under the provisions of this Chapter shall answer the bill or petition under oath, and the plaintiff shall except or reply to the answer as though the proceeding was in Chancery; the answer shall be regarded as the plea of the defendant, and by the replication there to an issue or issues shall be formed which shall be tried by the court or by a jury under the direction of the court as the court may direct or the parties agree."

~~But~~ there is neither doubt or ambiguity, nor in it is there anything unusual, especially so far as the formation of the issues is concerned. May the replication the entire answers were put in issue, whether they contained denials of the averments of the bill, or new matter set up by the ~~the~~ defendants in avoidance or defence, to maintain the issues on the part of the ~~defendant~~ plaintiff he had to substantiate, the averments of his bill, either by the admissions of the answers or by testimony. When that was done, it became necessary for each of the defendants to establish the defence set up in their answers respectively. The verdict shows that the plaintiff did establish his case and that the defendants failed to establish theirs. Had the defendant Nettleton proved the existence of the mortgages as set up in his answer, and this proof was not rebutted by evidence on the part of the plaintiff, the jury never could have rendered the verdict which they did, or if they had, upon application, the court would have set it aside as a moment. But so far from complaining of the verdict ~~nettleton~~ of the ^{defendants} ~~complainants~~ asked for a new trial, but acquiesced in it, without a struggle. It is now too late to complain that the verdict did not establish the true facts. Had the verdict established the truth of Nettleton's answer, then other questions would have arisen, which ~~would~~ ^{should} have had to have been determined before a final judgment or decree could have been rendered, such as the value of the improvement & the value of the land without the improvement, so that the court could have distributed the proceeds of the sale between him and the plaintiff according to the directions of the statute for such would have had a preference to a portion. But the jury having found against Nettleton, none of those more complicated questions ^{of fact} arose.

This statute does not contemplate a figned issue according to the English Chancery practice when questions arising in a Chancery ^{are tried} ~~are~~ by a jury. Although when the issues framed by these pleadings are complicated, it may be proper, to ~~simplify~~ simplify them by stating them to the jury in the form of simple interrogatories. In the statute itself however

It was further objected that no Commissioner was appointed to make sale of the land, nor was the master ordered to make the sale nor was a report of the sale ordered to be made, nor has there been any such report or approval thereof. It undoubtedly would have been proper, for the Court to have ordered the sale to be made by the master, or a Commissioner might have been appointed for that purpose, but the same result was produced by the issuing of a special execution, which was done, that of necessity was directed to the Sheriff, who was thereby commanded to sell the premises, and his return to the execution, would be nothing less than a report of the sale, ^{which} ~~and~~ if not proper in pursuance of law might be set aside by the Court and another sale ordered. It is true the decree does not determine to whom the surplus ^{if any} should be paid nor was that indispensable. That surplus would still remain under the control of the Court, and might, by a subsequent order, be directed to be paid over to whoever should show himself to be entitled to it. It is by no means uncommon for the Court of Chancery to have funds subject to its orders, to be made on the application of parties interested.

Nor should the decree be reversed because Williams, to whom Kelly in his answer avers ~~was~~ he had executed a mortgage subsequent to the date when the complainant's lien took effect, was not made a party. It would have been proper, after the answer with this averment, was filed, to have made Williams a party, but instead of doing so the complainant chose to take issue, upon the fact of the execution of such a mortgage, and the jury have found against ~~the~~ ^{its} existence of such a mortgage, Had they found otherwise, it perhaps would have been indispensable to have brought him in, but that finding certainly is sufficient to deprive ~~the~~ the defendants before the Court, from founding a complaint upon that averment which was thus found to be untrue. The rights of Williams, who was not made a party, are not affected by the decree or any proceedings under, it, if in truth he has such rights. He may still proceed to foreclose his mortgage, without injury by this proceeding.

The decree is not drawn with that formal precision which is advisable, but we think it substantially sufficient. If it were not, this Court would make the necessary decree as the record shows all that is necessary to warrant a final decree in the case. The conclusion of the order, "that the said Moses Nettleton, upon the payment of Costs, go hence without day,"

was particularly objected to as determining nothing definitively
as to him. The jury had found that he was not entitled to
the relief which, he had sought, by being made a party to the
suit, and it was proper therefore that he should be ~~dismissed~~
dismissed from the Court without such, or any relief, and
that he should pay the costs which he had made by his
interference and such was the result of the order which
was made by the Court. The previous part of the decree
had ordered the premises to be sold ~~for the~~ and that out
of the proceeds the plaintiffs damages & costs should be paid.
This taken in connection with the order in relation to
Nettleton, shows that the costs which the other defendants
were liable to pay was meant. A proper understanding
of the decree requires that the whole should be taken together
- or

Some other objections of less importance were made
which we do not think it necessary to ~~enter~~ notice
particularly. Upon the whole, we are of opinion that
the decree should be affirmed.

Decree affirmed

Wells to Chapman

Oppenon
Caton

Recorded

to be copied
to be recorded

11954

Prepared by the
Reporter