

13897

No. _____

Supreme Court of Illinois

Bowles

vs.

Simpson.

HENRY BOWLES
vs.
JOSHUA SIMPSON
WILLIAM FISHER
and
JABEZ FISHER,

In the
Supreme Court
April Term, 1858.

APPEAL FROM PEORIA.

This was an action of assumpsit commenced July 19th, 1856.

The Summons was served on William Fisher only.

The declaration in the first count alleges, that defendants were joint owners and partners in building and running the steamboat "Lacon," and that defendants were indebted to plaintiff in the sum of \$1,000 for services as Engineer on said boat.

Second Count, Same as the first.

Third Count, For goods, &c., sold and delivered, for work and labor done at request of defendants. For money lent. For money paid by plaintiffs, for the use of defendants, at their request. For money had and received by defendants for the plaintiffs' use, and for money found due upon an account stated. Damage claimed, \$1,000.

Defendant, William Fisher, filed the following pleas :

1, General issue.

2, That prior to the time the said steamboat Lacon commenced running, he was not a partner with the defendant, Simpson : which plea was verified by the affidavit of said William Fisher. Issue to the country.

The cause was tried by jury at March term, 1858 ; a verdict was rendered for the plaintiff for \$535, upon which judgment was rendered by the court.

The bill of exceptions contains all the evidence, which is in substance as follows :

John H. Floyd, called by plaintiff, testified, that plaintiff, in 1855, worked as engineer on the steamboat Lacon ; that witness was one of the firm of Scholey & Floyd, which firm furnished machinery and castings for said boat, amounting to about \$500 ; that he made out his bill in July, 1855, either against "Steamboat Lacon," Fisher & Simpson, owners, or against Fisher & Simpson, don't recollect which ; that in July, 1855, he called on William Fisher for the money. Fisher said he had given Simpson money to pay the debt, and it would be paid ; that he showed Fisher the bill as made out ; that he called a second time on Fisher ; he said Simpson had gone to LaSalle, was running the boat, and he supposed the debt had been paid ; that he went a third time to Lacon, found the boat at the landing, presented the bill to Simpson, on the boat, who said it was all right, but did not

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pay. Then went to Wm. Fisher, and told him: We made the bill on the credit of the Fishers, as we did not consider Simpson responsible; he said they were good for all demands made against them; *he* supposed the bill was paid. Understood William and Jabez Fisher composed the firm of Fisher & Co. William Fisher paid the account. Witness told him that a great many persons had furnished materials and labor on the boat, on account of his firm, and on their credit. He answered that Fisher & Co., were good for all debts that might come against them.

Witness had a conversation with Jabez Fisher, in Peoria.

Jabez said witness was mistaken in Simpson; he was an honorable man; that he had the money to pay *our* bill, and he would bring him up and have him settle it; but instead of coming up, he went off on the boat and sold her, and the boat has not been in the Illinois river since. Witness told him if he did not pay he would sue the bill. He said he did not want a law suit, and would rather lose money than have one. Thinks they did not deny any liability until after the boat was sold. The first conversation with William Fisher was before the boat was launched; the others were along two or three months after; that Simpson paid him some money, he asked a receipt. Witness inquired the name of the firm. He said it was Fisher & Simpson.

(All statements of Jabez Fisher and of Simpson, were objected to by the defendant, but admitted by the court.)

On cross examination he stated that plaintiff first spoke for the castings and the contract for them was made by Simpson; that at the time of the conversation with Jabez he threatened to attach the boat. The boilers put into the boat, came from St. Louis, and were marked in large letters, "Simpson & Fishers." Part of the pipes were not needed, and we bought them; the amount was credited in the bill I presented to William Fisher; presented the bill to William Fisher twice; he did not dispute the bill, or deny his liability.

H. G. Anderson, called by plaintiff, testified — I know William and Jabez Fisher, who I understood composed the firm of William Fisher & Co; steamboat Lacon was built at Peoria, under the superintendance of Simpson; I furnished some lumber for the boat, less than \$100 worth. It was settled by a note signed Simpson & Co. Simpson said the Fishers were interested some way; I saw Jabez Fisher, told him I had a claim against the boat, and did not intend to let her go out of the river unless it was paid. He said he did not want the boat stopped, that the claim would surely be paid; said there were other like claims said nothing about Bowles, the plaintiff. (All this conversation was objected to, as improper evidence.)

Witness continued — afterward I presented the note to William Fisher, and told him what Jabez had told me. He replied, Jabez was not at home, and told me when he would be; made no objection to the note, said he had given Simpson money to pay it, and it would be paid. Afterward I presented the note to Jabez, and he declined to pay it; said they and Simpson had run the Harding on joint account for two seasons, and made money; that they were pleased with Simpson, and wished to build a new boat, and put in the old boat; at the time I told him I intended to attach the boat, I think it was at Peoria laden with his produce for St. Louis; I think this was late in the fall. Fisher went down on the boat and sold her for \$7,500, as he told me. The last conversation with Jabez was in the fall of 1855. He told me they had advanced considerable money to Simpson, and had taken mortgages to secure themselves; said a suit had been commenced by plaintiff, and it would be better for both to await the event of this suit. He never denied the liability of the

Fishers, for debts contracted by Simpson, in building the steamboat Lacon.

Josiah L. Simpson, called by plaintiff, testified, that the boat, Capt. E. Harding was torn up in 1855; supposed she was owned by William and Jabez Fisher. Simpson and Fishers run it two seasons as partners. My brother contracted with plaintiff, to work for him and Jabez and William Fisher, in the spring of 1855, as engineer, during the season at \$75 per month; commenced on the 1st of April, and worked till late in the fall, perhaps December. They were running the Harding when the contract was made; after paying expenses they were to divide the profits. Some portions of the Harding were put into the new boat. The boilers were got from St. Louis, and came marked Fisher & Simpson. *My brother told me that the Fishers were in partnership with him.*

This evidence was objected to by the defendant. The Fishers knew of the boat being built. William Fisher was down three times during the summer, and named the boat. They advanced money to my brother. Bowles worked on the boat the year before. My brother paid money to Fisher on account of the Harding, in 1853 or 1854.

On cross examination he stated that the boat, Harding, made two trips; one to Lasalle and one to Browning, after lumber for the new boat, after the 31st March. Don't know whether the boat was delivered by Fisher to Simpson under their contract or not. I have seen my brother pay Bowles money at several times, once \$20; at two other times \$5 or \$10 each, heard him dunning my brother for money, he said he had none. My brother paid me some, I dont know how much; say \$150. My brother went to St. Louis for the boilers.

E. Morrison, called by plaintiff, testified that he knew Bowles, the plaintiff; that he was engineer on the Harding; that the same was owned by William and Jabez Fisher; Bowles was a good engineer; wages of 1st engineers \$125, and 2d engineers \$75 per month; is a lumber merchant, furnished lumber for the Lacon in 1855; understood, without knowing much about it, that Simpson and Fisher were owners. I sent my bill, \$125, to Lacon for collection; afterward received a check for \$100, signed Fisher & Co., on Central bank. The bill was made out in the name of Simpson & Fisher.

E. G. Johnson, called by plaintiff, stated, that he had a bill for collection, in favor of Lucas and Simonds, against steamboat Lacon; took the bill to Simpson, who told him to wait a few days and he would receive a draft of Fisher & Co. He waited, and received the draft. Don't know from where or how, think by letter, it was drawn by Wm. Fisher & Co.

George R. Lee, called by plaintiff; who stated that the plaintiff worked on the Harding and continued to do so until September, 1855. Simpson employed *me*. I never saw Fisher there. Commenced on the Lacon last of April or first of May, during which time plaintiff worked faithfully. Simpson paid me. I never had any conversation with Fisher, but had assurances that they would see me paid. Boilers were marked "Simpson & Fisher," or "Fisher & Simpson, Peoria." I understood I was working for Simpson and Wm. and Jabez Fisher; would not have worked unless I had believed the Fishers were liable. They, the Fishers, sent down the Fox to be repaired. Simpson went after the boilers; dont know that Fishers knew anything about them.

Josiah L. Simpson, recalled, testified that his brother run the Lacon, from the time she was launched until she was sold, in partnership with Jabez and William Fisher; that she was sold in the spring or summer of 1856, by Jabez Fisher for \$7,500. That after she was sold, his brother continued to run her up in Kansas. That the contract was made with plaintiff while Simpson and the Fishers were running the Harding as partners. Here the plaintiff rested.

The defendant then read in evidence a contract dated March 31, 1855, which is as follows :

This contract, made the 31st day of March, A. D. 1855, between William Fisher & Co. of one part, and Joshua Simpson of the other part. Witnesseth, That said Simpson hath this day agreed, and hereby agrees, to build a new hull for the steamboat Capt. E. Harding (now owned by said Wm. Fisher & Co.,) and have the same ready furnished, and completely rigged, with all necessary tackle and furniture for running, on, or before the first day of July next. The said Simpson agrees to furnish all material for said hull at his own expense, and build the same in a good substantial workman-like manner, for the building of which hull, and for removing the furniture, tackle, machinery, &c., from off the said Capt. E. Harding, to, and upon the said new hull, said Wm. Fisher & Company agree to pay said Simpson the sum of \$2,500, in manner hereinafter specified. The said Wm. Fisher & Co. are now the owners of one half the barge Orleans, and also of the barge or flat boat Abe. Said Simpson agrees to sell to said Wm. Fisher & Co., one eighth of each of said flats or barges, so that they, said Wm. Fisher & Co., will own five eighths of each of them and for said eighths of said flats or barges, said Wm. Fisher & Co., agree to pay said Simpson the sum of \$77 77 in manner hereinafter specified; said new hull shall be from one hundred and twenty to one hundred and twenty-five feet in length, and eighteen to twenty feet beam, and the hold not to be less than three and a half feet; said hull is to be planked on the sides with white or bur oak plank, two inches thick, and on the bottom with two and a half inch white or bur oak plank. It is agreed that when said new hull is completed, said Wm. Fisher & Co. shall deliver to said Simpson, the said steamer Capt. E. Harding, as she now is, at the sum of \$2,200, which last mentioned sum shall be a payment of that amount on the said sum of \$2,500. The said steamer, Capt. E. Harding, and all its rigging, tackle, and everything thereunto belonging, shall belong to said Wm. Fisher & Co., until said new hull is completed and delivered to them as aforesaid. Said Simpson agrees, and said Wm. Fisher & Co., hereby give their consent, that when said new hull is ready for the same, said Simpson, may remove the tackle, furniture, machinery and everything belonging thereunto, except her hull, to, and upon the said new hull, and said Simpson agrees, in consideration of the said sum of \$2,500, to cut down, and haul out and cork, and thoroughly repair, the present hull of the said steamer, Capt. E. Harding, so that the same can be used to advantage for a barge, and said Wm. Fisher & Co., agree to pay to said Simpson the balance which will be due to him, after he so receives said machinery, &c., now belonging to said steamer, Capt. E. Harding, for the aforesaid sales, and for doing the aforesaid work, which balance shall be the sum of \$75 27, which last mentioned sum shall include and be a payment of the aforesaid sum of \$77 77, and when said new hull is completed, and the machinery, tackle, &c. are removed from said Capt. E. Harding, and said new hull is in complete order for running, and the same is delivered to said Wm. Fisher & Co., as aforesaid, the said Wm. Fisher & Co., shall be the owners of five-eighths of all the aforesaid new flats or barges, and of said new hull, her rigging, tackle, machinery and everything belonging to said boat, and said Simpson shall be owner of three-eighths of the same property. And it is further agreed that when said new boat is delivered, as aforesaid, and the same is ready for running, the same shall be run by said Simpson, as a partner with said Wm. Fisher & Co., until the first day of December, in the year 1856, during the boating and towing season, and the said Simpson taking the charge and care of said boat, when she is laid by; said Simpson shall receive for his services in running said boat, the sum of one dollar and fifty cents per day, to be taken out of the

CHATTLE-MORTGAGE.—*Know, all men, by these presents,* that I, Joshua Simpson, of Peoria, of the county of Peoria, in the state of Illinois, of the first part, for and in consideration of two thousand dollars, to me in hand paid by William Fisher, of Lacon, of the second part, (the receipt whereof is hereby acknowledged,) do hereby grant, bargain and sell unto the said party of the second part, his heirs and assigns, the following goods and chattles, to wit :

One steamboat, lately built by said Simpson at Peoria, and by agreement to be called "Bison," and now lying at the landing in said Peoria, to have and to hold, all and singular, the said goods and chattles unto the said party of the second part, his heirs and assigns forever. And the said party of the first part, for himself, his heirs, executors, and administrators, doth hereby covenant to and with the said party of the second part and his assigns, that he is lawfully possessed of said goods and chattles, as his own property ; that the same are free from all encumbrance, and that he will warrant and defend the same to him, the said party of the second part, and his assigns, against the lawful claims and demands of all persons.

Provided, nevertheless, that, if the said party of the first part, his heirs, executors, and administrators, shall well and truly pay to the said party of the second part, his heirs, executors, administrators, or assigns, for the redemption of the above-bargained goods and chattels, the just and full sum of two thousand dollars, on or before the 1st day of November next, with interest, according to the tenor and effect of a certain promisory note given by the said party of the first part to the said party of the second part, bearing even date herewith, then this mortgage to be void ; otherwise to remain in full force and virtue : *and provided, further,* that, until default be made by the said party of the first part in the performance of the condition aforesaid, it shall and may be lawful for him to retain the possession of the said goods and chattles, and to use and enjoy the same ; but if the same, or any part thereof, shall be taken on execution, attached or claimed by any other person or persons at any time before payment, or if the said party of the first part shall attempt to sell the same without the authority and permission of the said party of the second part, in writing expressed, then it shall and may be lawful for the said party of the second part, or his assigns, to take immediate and full possession of the whole of the said goods and chattels, to his and their own use. In witness whereof, the said party of the first part has hereunto set his hand seal, this 7th day of November, 1855.

JOSHUA SIMPSON.

STATE OF ILLINOIS, }
PEORIA COUNTY, } ss.

This mortgage was acknowledged before me, by Joshua Simpson, this 7th day of November, 1855.

DENNIS BLAKELY, *Justice of the Peace, Peoria County.*

Recorded in docket, I page, 641 D. R.

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One steamboat called "Bison," now building in the lake, at the city of Peoria, Peoria county, Illinois ; to have and to hold, all and singular, the said goods and chattles unto the said party of the second part, his heirs and assigns forever. And the said party of the first

part, for himself, his heirs, executors, and administrators, doth hereby covenant to and with the said party of the second part and his assigns, that he is lawfully possessed of said goods and chattels, as his own property; that the same are free from all encumbrance, and that he will warrant and defend the same to him, the said party of the second part, and his assigns, against the lawful claims and demands of all persons.

Provided, nevertheless, that, if the said party of the first part, his heirs, executors, and administrators, shall well and truly pay to the said party of the second part, his heirs, executors, administrators, or assigns, for the redemption of the above-bargained goods and chattels, the just and full sum of two thousand dollars, on or before the 19th day of March next, with interest, according to the tenor and effect of a certain promisory note given by the said party of the first part to the said party of the second part, bearing even date herewith, then this mortgage to be void; otherwise to remain in full force and virtue: *and provided, further*, that, until default be made by the said party of the first part, in the performance of the condition aforesaid, it shall and may be lawful for him to retain the possession of the said goods and chattels, and to use and enjoy the same; but if the same, or any part thereof, shall be taken on execution, attached or claimed by any other person or persons at any time before payment, or if the said party of the first part shall attempt to sell the same without the authority and permission of the said party of the second part, in writing expressed, then it shall and may be lawful for the said party of the second part, or his assigns, to take immediate and full possession of the said goods and chattels, to his and their own use. In witness whereof, the said party of the first part has hereunto set his hand seal, this 19th day of March, A. D. 1856. JOSHUA SIMPSON. [L.S.]

STATE OF ILLINOIS, }
PEORIA COUNTY, } ss.

This mortgage was acknowledged before me, by Joshua Simpson, this 19th day of March, 1856. THOMAS DAUGHERTY, *Justice of the Peace, Peoria County.*

Witness, *Chapman*, further testified that the two notes of \$2,000 each, were not paid about one year ago, and had been sent to Weston, Missouri for collection; that no other accounts were kept between said parties; that the *Harding* accounts were settled at the same time with the accounts for building the new boat.

On cross examination he stated that Simpson ran the *Harding* in 1854, as partner of Fisher & Co.; they purchased the boat and Simpson ran it, and after paying expenses the profits were divided equally. The old boiler was not put in the new boat. Fisher & Co. paid for the new boiler, about \$1,100; old boilers were sold for \$600. The new boat was, I think, 160 feet long. Simpson and the Fishers ran the *Harding* in the spring of 1855, cannot tell whether they continued as late as July, 1855. They were partners in running the *Harding*, and plaintiff worked as engineer for the *Harding* all the time Simpson ran her. William Fisher went down frequently to see about the new boat. It cost several thousand dollars more than the contract price.

N. H. Purple, called by the defendant, stated, that he, as Fisher's attorney, advised him to pay Scholey's & Floyd's accounts, for the reason that the boat was liable under the statutes for mechanics' liens, although he was not personally liable on the contract. He knew nothing about the running of the *Harding*, and nothing about the facts, except as stated in the contract; his opinion was given in June, 1856. This was all the evidence.

The court instructed the jury as follows, at the request of the plaintiff:

1st. If the jury believe from the evidence, that the plaintiff performed labor for Simpson and the Fishers, the parties defendants to this suit, the jury should find for the plaintiff, the value of such labor as found.

2d. The plaintiff has only by a preponderance of evidence, to show that he performed labor for the benefit of Simpson and the Fishers, the parties defendants to this suit.

4th. If the jury believe from the evidence that the Fishers held themselves out to the plaintiff and others, to be joint owners or partners with Simpson in building the boat, or if said Fishers put it in the power of Simpson to induce the plaintiff to believe that Simpson and the Fishers were joint owners or partners in the building said boat; and if the jury should further believe, that Simpson did so represent to the plaintiff, and the plaintiff relied on such representation and did labor on said boat, the jury should find for the plaintiff for such labor.

8th. If the plaintiff labored for the defendant Simpson and the Fishers, the defendants in this suit, on the steamer E. Harding, the jury should find for the plaintiff for such labor.

9th. If the jury shall believe from the evidence that the defendants held themselves out as partners in the building of the boat, and the plaintiff did the work and labor for the defendants, and relied on them for his pay, and was not employed by Simpson, one of the defendants alone, upon his responsibility; the defendants are liable, although, in fact they were not partners in the building of the boat.

To these instructions the defendant objected and excepted.

The jury found a verdict for the plaintiff for \$535. The defendant entered a motion for a new trial, for the following reasons :

1st. The verdict is against law.

~~2d. The verdict is against evidence.~~

3d. Said verdict is against the weight of evidence.

4th. The court permitted improper evidence to be given to the jury on the part of the plaintiff.

5th. The court gave improper instructions, asked by the plaintiff.

6th. The damages were excessive.

The court overruled the motion, and gave judgment on the verdict, and defendant excepted.

The errors assigned are :

1st. That the verdict is against law and evidence.

2d. That the court permitted improper evidence to be given to the jury on the part of the plaintiff.

3d. The court gave improper instructions as asked by the plaintiff.

4th. The court erred in overruling the motion for a new trial.

N. H. PURPLE, *Attorney for Appellant.*

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Henry Bowles

vs

Joshua Simpson & Co

13897

Filed April 29, 1838

to Belmont

clerk

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