

12350

No. _____

Supreme Court of Illinois

Hunter

vs.

Blanchard

71641  7

126

Allen Hunter et al
vs
Joseph Blanchard

126

12350

1857



And now come the appellants herein and say that in the record, and proceedings ^{final order &} and decree of the Court ^{below} herein, Manifest Error hath intervened, to their injury - In this =

- 1st = said Court erred in overruling the demurrer of the defendants, to original & amended Petition of said Petitioner Blanchard =
- 2nd = said Court admitted improper Evidence on the part of said Petitioner =
3. said Court excluded proper Evidence offered by the defendants =
4. said Court erred in excluding said Witness McNeal =
5. said Court gave erroneous instructions for Petitioner
6. The Court refused proper instructions asked by Defs.
7. ~~said~~ The verdict of the jury is against Law =
8. said Verdict is against Evidence =
9. The Court erred in overruling the Motions for New trial & in arrest of judgment =
10. The Court erred in the rendition of said decree for Petitioner =

Wherefore and for other errors appearing in said record, appellants pray that said decree and the verdict of said jury and proceedings aforesaid may be set aside, reversed and for Nought esteemed =

Purple, Pratt - and
Cooper ~~Attorneys~~
for appellants

And the defendant in Error comes and says there is no error in the record proceedings or decree to this cause & that he is ready to verify the record
J. G. M. M. G. is atty

1. State of Illinois, Peoria County, ss. - Pleas in the circuit Court in and for the County of Peoria and State of Illinois, before the Honorable, the Judge of said Court presiding therein according to law.

To all whom it may concern, Know Ye, that the records of said Court being inspected and examined, there appears of record among the records and proceedings of said Court, the following matters and things - to-wit

Be it remembered, that on the 23^d day of March, A.D. 1855, there was filed in the Clerk's office of the Circuit Court aforesaid, the following petition:

To the Hon. Onslow Peters Judge of the Sixteenth Judicial Circuit of the State of Illinois

Your Petitioner Joseph Blanchard of the County of Peoria and State of Illinois represents unto your Honor. That on or about the first day of July, A.D. 1854, Frederick R. Gunn and Samuel Gates were prosecuting business, under the name and firm of "Gunn & Gates" in the Town of Chillicothe in said County of Peoria, and that said Gunn & Gates at the time aforesaid owned and possessed or were the respected owners of Lots number Eight (128) in Block Number one (No 1) and Lot Number two (102) in Block forty six (46) Situate in said Town of Chillicothe Peoria County and State aforesaid, that said Gunn & Gates on or about the said first day of July, A.D. 1854, entered into a Contract with your petitioner who was then and there a Lumber Merchant to furnish Lumber for two buildings which said Gunn & Gates were then

about to erect upon Said Two Lots, one of Said building to be a frame Ward House, one Story high, sixty feet long and thirty feet wide. Said Ward House to be built upon Said Lot, number two and used for storing grain &c. The other of Said buildings to be a frame Store House two Stories high, thirty feet long and twenty feet wide to be built upon Said Lot number Eight and used for retailing Goods Merchandise &c. That Said Blanchard agreed to furnish all Lumber Studding Joists Planks Boards Lath &c necessary for the construction of Said buildings, and at such times during the progress of Said constructions as Said Gunn & Gates should direct and order and that Said Gunn & Gates promised to pay to the Said Blanchard for Said Lumber &c. used in the construction of Said buildings the sum of Nine hundred and sixty four Dollars and fifty one Cents. Your petitioner further Shows that under and in pursuance of Said Contract he the Said Blanchard did furnish all the Lumber Joists Studding plank Boards Lath &c (more particularly set forth in a Bill of particulars hereto attached and marked "A") used in the construction of Said buildings and at the times required in Said Contract and the Lumber &c so furnished, by your petitioner amounted, in value to the Said sum of Nine hundred & sixty four $\frac{51}{100}$ Dollars. and your petitioner further Shows that Said Gunn & Gates prosecuted, & continued, the construction of Said two buildings at the same time and your petitioner had no information or knowledge as to the precise quantity, kind or value of the Lumber used on either

of the buildings but the same was used in both buildings
 & in manner & form as desired by Gunn & Gates. Your petitioner
 further represents that said Lumber &c. was furnished on
 and between the thirteenth day of July A.D. 1854 and the
 fourth day of December A.D. 1854, and at the time last
 aforesaid the said Gunn & Gates promised to pay your
 petitioner the said sum of money then due him, yet
 the said Gunn & Gates have not paid said sum of mon-
 ey nor any part thereof for which said sum your
 petitioner ought to have a lien upon said two buildings
 and the said two Lots. — Your petitioner further repre-
 sents to your Honor that in or about the ^{said} fourth day
 of December A.D. 1854, the the said Gunn & Gates be-
 came embarrassed and insolvent & in or about that day
 assigned all their property and conveyed said premises
 and buildings to one Sylvester C. Pilley who took and
 accepted said conveyance subject to the demand and
 claim of your petitioner. What the same should be
 reasonable worth and your petitioner shows that said
 Lumber (a Bill of which with the quantities kinds & prices
 is hereto attached & made part of this petition) was
 reasonable worth. Your petitioner further states that
 Allen Hunter Johnathan C. Cooper & Lorin B. Pratt
 claim some interest in said premises but they and each
 of them took said interest subsequent to the furnishing
 said materials by petitioner & subject to the lien of
 petitioner and used for this said materials &c.
 Your petitioner further states that said Sylvester C. Pilley
 took actual and exclusive possession of said buildings

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and said two Lots were about said fourth Day of
December A.D. 1854, and from thence hitherto has
remained & still is in the exclusive possession thereof
but took the same with full knowledge of Plffs Claims
He further states that there have been no payments
made for said Lumber, and that the whole amount
thereof is due and owing to your petitioner. your peti-
tioner further shows that the time of furnishing said
Lumber nor said Contract extended, to a longer pe-
riod than three years nor the time of payment
beyond the period of one year from the time all of
said Lumber should be delivered,
your petitioner therefore prays the aid of the Court
in this behalf that the said Frederick R. Gunn
Samuel Gates and Sylvester C. Kelly, Allen Hunter
Johnathan C. Cooper & Lonia G. Pratt be made parties
& Defendants to this petition. that they and each of
them be duly summoned in this cause, that they and
each of them answer all and singular the several
Matters & things hereinbefore set forth but without
oath their oaths being expressly waived that upon
the final hearing of this cause an account may be taken
of the amount due to your petitioner for the Lumber
so furnished. that he may have and obtain a
decree and order of your Honor, perfecting his title
on said premises for the amount found to be his due
and that said Defendants Gunn & Gates or Kelly,
or some of them be decreed to pay said sum of
money within such short Day to be fixed by the Court

5 and that in default of such payment said premises may be sold, under the order of the Court, and that the respective rights & claims of the parties be adjusted and settled by the Court, and that your petitioner, may have such other and further relief as Equity and good Conscience may require

Grove & McCoy
Sols for Petitioner

Joseph Blanchard

vs.
Friedrich R. Gunn
Samuel Gates
Sylvester C. Tilley

In Seneca County Circuit Court
Petition for Mechanic's Lien To
March Term A.D. 1855.

Issue Summons in the above
entitled, Cause returnable according to Law
Grove & McCoy,
for Petitioner

To Jacob Gale Clerk

"A"

Gunn & Gates

To Jas^d Blanchard Dr.

July 13th 1854

To 378 feet of 18 Studs

8 31

" 134 " " 16 "

2 94

" 48 " " 12 "

" 96

" 504 " " 18 "

11 08

" 1050 " " Siding

23 10

15th " 458 " " 12 Trist

9 16

55 55

17 " 304 " " " Studs

6 08

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60

July

	To.	33 feet	of 16 Studs	"	72		
	"	36 "	" 14 "	"	72		
18	"	158 "	" Siding	\$	30		
	"	119 "	" clear plank	\$	57		
26	"	2832 "	" 18 Joist	62	30		
	"	1088 "	" " "	24	15	100	84
27	"	320 "	" 12 Studs	6	40		
	"	114 "	" 14 "	2	28		
29	"	6225 "	" Siding	136	95		
	"	3 4th	Lath	13	50		
	"	144 feet	of 18 Studs	\$	16		
Aug 1	"	60 "	" 18 "	1	32		
3	"	57 "	" 14 "	1	14	164	75
9	"	336 "	" 18 Joist	7	39		
12	"	396 "	" " Studs	8	71		
	"	84 "	" " 14 "	1	68		
16	"	20 "	" " 12 "	"	40		
18	"	33250	Shingles	166	25		
21	"	144 feet	of 18 Studs	\$	16		
	"	100 "	" " " "	2	20		
	"	1581 "	" " Corn Boards x	31	62		
	"	1736 "	" " 14 Joist	34	36		
	"	744 "	" " 12 "	14	88	269	49
						\$	590.63
Amount Brought over							590 63
Aug 22,	To.	1734 feet	of Corn Boards	43	35		
"	"	444 "	" " Corn Boards	8	88		
Sept 1	"	1040 "	" " 12 Joist	28	80		

7	Apr 11	\$ 427	feet of Sheeting	7	68		
	16	" 592	" " "	10	25		
	"	656	" " Corn Boards	13	12		
	"	580	" " " "	11	60		
	"	461	" " " "	9	22		
	19	" 1976	" " " "	39	53	161	42
	"	93	" " Clear Boards	2	59		
	21	" 253	" " Clear	6	23		
	"	613	" " Corn Boards	12	26		
	23	" 605	" " " "	12	10	33	18
	Apr 8	"				\$785	23
	"						
	N. 8	" 629	feet of Corn Boards	13	83	13	83
	9	" 390	" " " "	8	58		
	16	" 739	" " " "	16	25		
	"	56	" " 14 Studs	1	23		
	"	64	" " 16 "	1	53		
	"	60	" " 18 "	1	44		
	22	" 26	" " Clear Boards	"	78		
	"	88	" " 16 Studs	2	09		
	"	1 M	Lath	5	00		
	"	1 M	"	5	00	41	90
	Dec 4	" 5559	feet of Corn Boards			122	29
						\$963	25
	"	Mistake in opisid side				1	26
						\$964	51

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Upon which the Clerk of the said Circuit Court issued a summons in said Court cause to the Sheriff of Peoria County which is in the words and figures following to wit:

Summons

The People of the State of Illinois, To the Sheriff of Peoria County. Greeting. We Command you to Summon Frederick R. Gunn, Samuel Gates and Sylvester C. Keller if they may be found in your County, to appear before our Circuit Court on the first day of the next term thereof to be held at Peoria, within and for the said County of Peoria, on the second Monday of May, next, then and there in our said Court, to answer the matters and things contained in certain petition for Mechanics lien filed against them in our said Court by Joseph Blanchard and make return of this Writ, with an endorsement of the time and manner of serving the same on or before the first day of the term of the said Court to be held as aforesaid.

Witness Jacob Gale, Clerk of our said Court and the Seal thereof, at Peoria this 23rd Day of March in the year of our Lord one thousand eight hundred and fifty five, Jacob Gale Clerk



return

Upon which the Sheriff of said County made his return in the words and figures following to wit:

Served on Samuel Gates by reading to him this Writ May 3rd 1855
D. D. Irons Sheriff
per J. H. Batchelder Deput

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And afterwards to wit on the 2nd day of May the
petitioner filed in the office of the clerk of said Court
his amended and supplemental bill which is in
the words and figures following to wit;

Amended & Supplemental bill
To The Hon Charles Peters Judge of the Peoria County
Circuit Court in Chancery sitting

your petitioner Joseph
Blanchard by way of amendment and Supplement to the
original petition filed in this cause on the 23rd Day of
March 1835. respectfully represents that since the filing
of said original petition in this cause your petitioner has
learned that Johnathan K. Cooper & John G. Pratt claim
some interest in said premises. in said original petition
described, & that one Allen Hunter of said County of
Peoria, and whom your petitioner prays may be made
a party defendant to this amended & Supplemental bill.
and to the said original petition filed by your petitioner
has purchased the said two Lots ^{in said original petition described & viz:} number eight (808)
in Block number one, and Lot number two in Block
forty six (Lots, in BK. 14 Lot 2, in BK 46.) in the
town of Chillicothe. but that said Hunter & Cooper & Pratt
had full notice of the lien and claim of your petitioner
on said two Lots & said Allen Hunter purchased the
same subject to the lien claim and demand of your
petitioner as set forth in your petitioners original peti-
tion. your petitioner therefore prays that said Hunter
Cooper & Pratt may answer said original petition & this

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amended, petition but without oath their oaths being
expressly waived, & that your petitioner, may have all the
relief prayed in said original petition & that said Lien
may be perfected, & Lots sold & proceeds applied in
payment of amount due to your petitioner as set forth
in said original petition By Groce & McCoy
Sols for Petitioner

Upon which the clerk of said Court issued a Summons in
said cause to the Sheriff of Peoria County, which is in the
words and figures following to wit:

Summos

The People of the State of Illinois. To the Sheriff
of Peoria County. Greeting. We Command you to summon
Allen Hunter, if he may be found in your County, to
appear before our Circuit Court on the first day of the
term thereof, to be held at Peoria, within and for the
said County of Peoria, on the 2nd Monday of May instant
then and there, in our said Court, to answer the matters
and things contained in a certain Bill of Complaint &
amendment exhibited against him and Friedrichs R.
Gunn, Samuel Gates and Sylvester C. Tilley in our said
Court in Chancery by Joseph Blanchard and make return
of this writ with endorsement of the time and manner of
serving the same on or before the first day of the term of the
said Court to be held as aforesaid. Witness Jacob Gale.



Clerk of our said Court, and the Seal thereof
at Peoria this 2nd day of May in the year of our
Lord one thousand eight hundred and fifty five
Jacob Gale, Clerk

Whereupon the Sheriff of said County made his return as follows;
 served on Allen Hunter by reading to him this writ
 May 3rd 1855.

D. D. Travis Sheriff
 pr J. H. Batchelder. Deft

Proceedings at a Term of the Circuit Court begun and held
 at the Court House at the City of Leona in and for the
 County of Leona in the State of Illinois on the third Mon-
 day of November in the year of our Lord one thousand
 eight hundred and fifty five it being the Nineteenth Day
 of said month— Present the Honorable Onslow Peters Judge
 of the Sixteenth Judicial Circuit in the State of Illinois
 David D. Travis Sheriff and Jacob Gale, Clerk, to wit.

Monday November 19th A.D., 1855

Joseph Blanchard

vs.

petition for Mechanics Lien

Fredrick R. Gunn & others

This Day came the plaintiff by
 Grood & McCoy his attorneys and entered a motion for
 a rule on the Defendants to file their answers in this cause
 by Wednesday morning next.

Monday, November 26th A.D., 1855.

Joseph Blanchard

vs.

in petition for Mechanics Lien

Fredrick R. Gunn & others

This day came the Defendant by
 Louis G. Pratt their attorney and entered a motion for
 a rule on the plaintiff to file a substitute for original
 Bill herein by to-morrow morning

Friday November 30th A.D. 1855

Joseph Blanchard

vs.

on petition for Mechanics Lien

Fredrick R. Gunn

Samuel Gates

Sylvester C. Tilley

This Day came in to be heard the demurrer of the Defendants to the petition herein, and the court being fully advised in the premises is of opinion that said petition is sufficient to maintain this action. Whereupon on motion of the petitioner leave is given him to amend his petition herein.

Proceedings at a term of the Circuit Court begun and held at the Court House, at the City of Peoria in and for the County of Peoria in the State of Illinois, on the Second Monday of May, in the year four Lord one thousand eight hundred and fifty six, it being the twelfth Day of said Month Present the Honorable Jacob Gale Judge of the Sixteenth Judicial Circuit in the State of Illinois. David D. Irons Sheriff and James S. Barkman Clerks. To Wit:

Tuesday May 13th, A.D. 1856.

Joseph Blanchard

vs.

on Petition for Mechanics Lien

Fredrick R. Gunn

Samuel Gates

Sylvester C. Tilley

Allen Hunter

This Day came the petitioner by Henry

Grove his attorney and the Defendants by their attorney and upon their agreement leave is given the petitioner to amend his petition herein and make Jonathan K. Cooper & Leon G. Pratt parties Defendants to this cause whereupon said Cooper & Pratt appeared in open Court and entered their appearance in this cause.

And afterwards to wit on the 13th day of May A D 1856 the defendants filed in the clerks office of said Circuit Court their joint answer to the petition & amended petition which is in the words and figures following to wit:

answer

Joseph Blanchard

vs.

Frederick R. Gunn

Samuel Gates

Sylvester C. Pilley

Allen Hunter

Jonathan K. Cooper

Leon G. Pratt

In the Circuit Court Peoria Co Ills

November Term 1856

Petition for Furnishers Lien

The joint & several answers of all of the above named Defendants to the petition and amended petition of said Joseph Blanchard herein - the said Defendants Gunn & Gates Sylvester C. Pilley Allen Hunter & Cooper & Pratt for answer to the said petition or to so much thereof as they are advised it is necessary or material for them to answer unto answering say - that it is true as stated in said petition that said Frederick R. Gunn & Samuel Gates were partners in business in said Town of Chillicothe under the name and style of Gunn & Gates, and that they were the own-

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ers & possessed of the premises in said petition mentioned as therein stated. What contract said Gunn & Gates made with petitioner or whether they made any contract with him to furnish Lumber &c for buildings on said Lots. Respondents are ^{not} sufficiently advised and therefore neither admit nor deny the same and call for the proof. Respondents however admit that said Gunn & Gates did purchase some Lumber from said petitioner, and that a part of it may have been used in & about the construction of certain buildings or a certain building erected by said Gunn & Gates upon one or both of said Lots. but how much Lumber was so purchased and what it was worth and what portion was so used they cannot state specifically, but they state that the amount so furnished & used was less than stated in said petition, and they put said Defendant to the proof within what time said Lumber was furnished, and what particular promise if any, was made by said Gunn & Gates to petitioner. Respondents are not sufficiently advised and therefore neither admit nor deny the same, and call for the proof, but Respondents deny that petitioner was not paid by said Gunn & Gates for the Lumber so furnished by him, and on the contrary they expressly charge that petitioner has been fully paid for all the Lumber & Materials furnished by him to said Gunn & Gates and used in & about the construction of said buildings or either of them and that there is not now and was not at the time of commencing this suit anything due to petitioner on that account. Respondents admit that said Gunn & Gates became embarrassed in their circumstances & made an assignment of their property for the benefit of

creditors, and that said Philley was appointed, assigned and accepted the trust, as stated in said petition. What knowledge said Philley had of Petitioner's claims, Respondents do not know, but they charge that he could not have had much knowledge in the subject in as much as the petitioner had no such claims as he now sets up. Said Philley took possession of the property of said Gunn & Gates under said assignment and continued to act as such assignee until about the — Day of — 1855. When he left the State of Illinois and gave up & abandoned said trust — and afterwards to wit, at the May Term A.D. 1855. the powers & authority of said Philley as such assignee, were by the order & decree of the Circuit Court of said Peoria County revoked, and the said Philley set aside & removed from the further exercise of the powers & duties pertaining to said Trust, and thereupon, by the like order and decree of said Court, the said Jonathan K. Cooper & Lorin G. Pratt, were duly substituted as assignees in the place of said Philley, to carry out & finish the business of said assignment, and said Cooper & Pratt thereupon accepted said trust & entered upon the duties growing out of the same, and are now in the active discharge of said duties and expect so to continue till the whole business of said assignment is wound up & completed, and Respondents here refer to the said order & decree of said Court and ask that the same and the papers in said Cause and proceedings of the Court in the premises, maybe held & taken as part of their answers therein. Respondents again deny that no payments have been made to Petitioner upon said Sumner as stated in said petition and that there is any

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 thing due to petitioner therefor - Respondents cannot say
 within what time said lumber was to be furnished or how
 long said contract extended & call for the proof - Respondent
 admit that said Allen Hunter purchased said Lot 8. in
 Block 1. & 2 in Block 46. as stated in said petition -
 but deny that ^{he} had any knowledge of the lien or claim upon
 said premises now set up by petitioner, or that he took the
 same subject to any such Lien or Claim, and again expressly
 charge that petitioner has no such Lien or claim against
 said premises as now set up by his original & Supplemental
 Petition herein - and ^{charging} ~~truly~~ fully answered. Respondents pay
 to be hence dismissed with their costs &c

Purple & Pratt.
 Cooper & Reynolds, for
 Respondents -

Upon which the petitioner to wit on the 13th day of May
 A.D. 1856 filed his replication in the clerks office of said
 Circuit Court which is in the words and figures following
 to wit:

Joseph Blanchard	
vs.	In Peoria County Circuit
Fredrick R. Gunn	Court.
Samuel Gates	
Sylvester C. Tilley	Petition for Mechanics Lien
Allen Hunter	
Johnathan R. Cooper	
Sam H. Pratt	

And the said petitioner comes & says that

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all the matters and things in his petition set forth are true and all the several matters contained in the answer of the Defendants contrary thereto are wholly false & untrue & this he is ready to make appear as by this Court shall be directed to.

By Grover M. Cory
(his Solr)

Proceedings at a term of the Circuit Court begun and held at the Court House at the City of Peoria in and for the County of Peoria in the State of Illinois on the Second Monday of May in the year of our Lord one thousand eight hundred and fifty six is being the twelfth Day of said Month Present the Honourable Jacob Gale, Judge of the Sixteenth judicial Circuit in the State of Illinois, David D. Irons, Sheriff and James C. Parkman, Clerks. to wit

Friday May 30th A.D. 1856

Joseph Blanchard

vs.

On Petition for Mechanics Lien

Frederick R. Gunn.

Samuel. Gates.

Sylvester C. Tilly.

Jonathan K. Cooper.

Lorin G. Pratt.

By the agreement of parties this cause is continued to the next November Term of this Court

Proceedings at a term of the Circuit Court begun and held at the Court House in the City of Peoria in and for the County of Peoria in the State of Illinois on the third Monday of November in the year of our Lord one thousand eight hundred and fifty six is being the seventeenth Day of said Month

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Present The Honorable Elisha N. Powell Judge of the
Sixteenth Judicial Circuit in the State of Illinois, David D.
Luns Sheriff and Enoch S. Sloan Clerk. To Wit

Tuesday November 18th A.D. 1856
Joseph Blanchard

vs.

On Petition for Mechanics Lien

Frederick R. Gunn

Samuel Gates

Sylvester C. Tilley

The Defendants entered a motion for
the Continuance of this Cause. Whereupon with the assent of
the parties it is ordered that this Cause be passed in order
for trial untill Wednesday of Next Week. but as the Defendants
costs.

Wednesday November 26th A.D. 1856
Joseph Blanchard

vs.

On Petition for Mechanics Lien

Frederick R. Gunn

Samuel Gates

Sylvester C. Tilley

Allen Hunter

Jonathan H. Cooper

& Lorin G. Pratt

This Day came the said Joseph Blanchard by
Grove & McCoy his Solicitors and the defendants Cooper and
Pratt in person and Solicitors for their co-defendants. it is
ordered by the Court that a jury be empannelled to try the
issues in this Cause. Whereupon came a jury of twelve good and
lawful men to wit John M. Irwin, Enoch Huggins A. S.

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Curtinius. Elisha Barrett. George Spurek. John Reynolds
 Anson Crow. Matthew Tager. John Singer. Edwin Matthews
 James W. Smith and Jacob Gujer. Who being duly chosen
 tried and sworn well and truly to try the issues in this cause
 and a true verdict give according to Evidence & the Evidence
 not having been fully heard were adjourned to meet the
 Court again to-morrow morning.

Thursday November 27th A.D. 1856.

Joseph Blanchard

vs.

Frederick R. Gurn

on Petition for Mechanics Lien

Samuel Bates

Sylvester C. Filley

Allen Hunter

Jonathan R. Cooper

Lonin G. Pratt

This Day came the parties by their respective
 attorneys and the jury empannelled in this cause on yesterday
 and the evidence having now been fully heard, the jury
 aforesaid on their oaths aforesaid do say. We the jury find
 the issue for the Petitioner, and that there is due him in the
 contract in the petition specified the sum of six hundred
 and thirty two Dollars and nineteen cents. The Defendants
 entered a motion for a New trial in this cause

Upon which the defendants on the 1st day of December
 A.D. 1856 filed in the clerks office of said Court their reasons
 for a motion for a new trial in this cause, which is in the
 words and figures following to wit;

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 motion for new
 trial

Joseph Blanchard vs. Circuit Court Peoria County, Ill.
 Nov Term 1856
 Frederick R. Gunn & als

Defendants Came & move the Court

1. for a New trial herein, and for Cause Show the Court admitted improper evidence in the part of the Complainant
2. The Court excluded proper evidence offered by Defendants
3. The Court Erred in the instructions given for Complainant
4. The Court refused proper instructions asked by Defendants
5. The Court Erred in Excluding the testimony of Henry H. McNeel a Witness offered in the part of the Defendants
6. The Court Erred in modifying certain instructions asked by Defendants
7. The Verdict of the jury is against Law
8. The Verdict of the jury is against the Evidence
9. The Jury ought not to have found interest
 Cooper & Pratt
 for Defts =

Proceedings at a term of the Circuit Court begun and held at the Court House in the City of Peoria in and for the County of Peoria, in the State of Illinois on the third Monday of November in the year of our Lord one thousand eight hundred and fifty six, it being the seventeenth Day of said Month - Present the Honorable Elihu N. Powell, Judge of the Sixteenth Judicial Circuit in the State of Illinois - David D. Irons Sheriff and Enoch P. Sloan Clerk, to wit:

Tuesday December 3rd A.D. 1856
Joseph Blanchard

vs. On petition for Mechanics Lien
Frederick R. Gunn
Samuel Gates
Sylvester C. Filley
Allen Hunter
Jonathan H. Cooper
Lorrin G. Pratt

This Day came the parties by their respective attorneys, and the defendants motion for new trial came on to be heard. the Court being fully advised in the premises overruled said motion for new trial in this Cause.

Upon which the defendant ~~and~~ filed their motion for an arrest of judgment or decree in this cause in the clerks office of said Court to wit on the 4th day of December which is in the words and figures following to wit;

Joseph Blanchard vs. Circuit Court November Term
Frederick R. Gunn & als A.D. 1856. In Chancery for Lien

motion in arrest
of judgment
212350-127

Defendants came & gave the Court for an arrest of judgment or decree in this Case directing the Sale of the premises in said petition, mentioned and for Cause Show-

1. There is nothing in the Verdict of the jury rendered herein to justify such order or decree-
2. From the finding of the jury, it cannot be determined whether any or what part of the Lumber sued for was furnished for or put into the buildings named in said Bill=-
3. The finding of the jury does not show that said debt was a lien upon the premises described in said Bill.=

Cooper & Pratt
for Defts.

Proceedings at a term of the Circuit Court begun and held at the Court House in the City of Peoria in and for the County of Peoria in the State of Illinois on the third Monday in November in the year of our Lord one thousand eight hundred and fifty six, it being the seventeenth Day of said month. Present the Honorable Elisha N. Powell Judge of the Sixteenth Judicial Circuit in the State of Illinois- David D. Irons Sheriff and Enoch J. Moan, Clerk. To Wit:

Thursday December 4th A.D. 1856.

Joseph Blanchard

vs.

On Petition for Mechanics Lien
Frederick R. Gunn, Allen Hunter
Samuel Gates, Jonathan R. Cooper
Sylvester L. Pilley, Lorin G. Pratt.

This Day this Cause came on to be heard on a Motion of the petitioner for a decree of this Court ^{enforcing} the Lien of the petitioner against the Defendants in conformity with the Verdict of the Jury rendered in this Cause on the twenty ninth Day of November last Whereupon the Defendants entered a motion in arrest of judgment or decree in this Cause directing Sale of the premises in the petition mentioned for reasons on file on Consideration Whereof the Court being fully advised in the premises overruled said motion of Defendants in arrest of Judgment & — And the Court now being fully advised in the premises find that petitioner did contract with the Defendants Fredericks B. Gunn and Samuel Gates to furnish Lumber Materials &c as in said petition alleged, and that the petitioner did furnish such Lumber Materials &c as in said petition set forth, and the Court further find that there is still due to the said petitioner from said Gunn & Gates the sum of Six hundred and thirty two Dollars and nineteen cents, Which ought to be and is a valid Lien on said Lots number Eight in Block number one and Lot Number two in Block number forty six in the Town of Chillicothe in the County of Peoria and State of Illinois, it is therefore ordered adjudged and decreed by the Court, that there is due to the petitioner the sum of Six hundred and thirty two Dollars and nineteen cents from said Gunn & Gates for such Materials and the same is hereby decreed to be a valid Lien on said Lot Eight in Block Number one, and Lot number two in Block number forty six in said Town of Chillicothe in Peoria County in the State of Illinois. It is further ordered adjudged

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and decreed by the Court here that the Defendants Frederick R. Gunn and Samuel Gates pay to the said petitioner the said sum of six hundred and thirty two Dollars and nineteen cents within twenty days from the making of this Decree and that in case said Gunn & Gates should make default and should fail to pay ~~to pay~~ the said sum of six hundred and thirty two Dollars and nineteen cents to the petitioner within the time limited by this decree then and in that case George S. Blahely Master in Chancery in this Court who is hereby appointed a Special Commissioner for that purpose shall proceed to sell said Lot number Eight in Block number one and Lot number two in Block number forty six. Situate in the Town of Chillicothe in the County of Peoria and State of Illinois to the highest and best bidder or bidders for cash after having first given due notice of the time place and terms of Sale together with a correct description of the premises to be sold by publication of notice for four successive weeks in the Peoria Weekly Republican or Newspaper printed and published in the City and County of Peoria and State of Illinois being the nearest newspaper and of general circulation therein and by posting up similar notices in four of the most public places in the County of Peoria aforesaid and it is further ordered by the Court that said Lots shall be sold separately and in case one of said Lots should sell for a sufficient sum of money to pay said petitioner the said sum of six hundred and thirty two Dollars and nineteen cents with interest thereon from the Date of this decree and the costs of this proceedings the said Master shall not sell the

remaining Lot, and it is further ordered that upon making
 Such Sale, Said Master and Commissioners herein appointed
 shall hold the Same at the front Door of the Court House
 in the City and County of Peoria and State of Illinois
 between the hours of nine O'clock, A.M. and four O'clock P.M.
 of the Day of Such Sale and upon the making Such Sale
 Said Master shall Execute to the purchaser or purchasers at
 Said Sale a Certificate of purchase of the premises Sold, and
 that the Defendants shall have the Same Right of redemption
 as though Said premises were Sold upon Execution at law
 and that the Defendants pay the costs of these proceedings
 to be taxed, the Defendants Allen Hunter, Jonathan H.
 Cooper and Lonin G. Pratt prayed and appeal in this cause
 to the Supreme Court, which is allowed on their filing Bond
 in the penal Sum of one thousand Dollars with Norman H.
 Purple as Surety, conditioned according to Law in the Clerks
 office in thirty Days

And afterwards to wit on the 20th day of December A.D.
1856 there was filed in the office of the Clerk of the Circuit
Court of Peoria County ~~at~~ a bill of exceptions in said
cause which is in the words and figures following to wit:

Joseph Blanchard

vs

Frederick R. Gunn

Samuel Gates

Allen Hunter

Jonathan K. Cooper

Levin G. Pratt

Sylvester C. Philley

Petition for mechanics lien
 In Circuit Court
 of Peoria County Illinois
 November Term

A.D. 1854.

Be it Remembered that on the trial of this cause the Petitioner to maintain the issues herein on his part produced John L. Palliott a witness who being duly sworn testified as follows to wit: That he knew the parties to this suit. That in the year 1854 witness was agent for petitioner in the sale of lumber of at Chillicothe Peoria County, that during said year petitioner was residing in Chicago, and was only occasionally at Chillicothe. That during the year 1854, defendants Gunn and Gates were doing business as merchants in Chillicothe, that during said year they built a warehouse and an addition to their store; that before the commencement of their said buildings they applied to the petitioner for lumber and furnished a bill for lumber which they wanted at the same time they paid to Petitioner four Hundred dollars, as an advance upon said lumber. This was in June 1854. Afterwards a part of the lumber specified in their bill was received by me with other lumber of Petitioners at Chillicothe. Before the lumber arrived however Gunn & Gates had changed their plan for their warehouse and did not want the

particular bill of lumber which they first furnished, but they got in lieu of that bill, the bill of lumber attached to the petitioners petition filed herein. The lumber charged in the last named bill was delivered by me for Petitioner during the summer and fall of 1854, and amounted in all to nine Hundred and sixty four dollars and fifty one cents (\$964.51). This is the amount of on the lumber furnished by petitioner to Gunn & Gates. It was understood between the petitioner and Gunn & Gates that they should pay for the lumber as the same was delivered. I know some of the lumber was put into the warehouse and store but whether all or not do not know.

Sometime after the advances of \$1100. the defendants Gunn & Gates paid to petitioner \$216 in money and sometime in the fall Gunn & Gates freighted a load of lumber for petitioner from Chicago to Chillicothe which amounted to between one and two Hundred dollars; don't recollect the precise amount, but the amount of the freight and the \$216 money made the amount afterwards endorsed on the notes of Gunn & Gates to Blanchard. The lumber specified in the first bill of Gunn & Gates, was kept by Blanchard and sold by him as other lumber at his lumber yard in Chillicothe; Gunn & Gates stated at the time that it was for their ware house & store. After Gunn and Gates made their assignment it was agreed between Philley, as assignee and the petitioner that the \$216. and the amount of the freight bill should be applied on certain notes held by petitioner against Gunn & Gates; these notes were given by Gunn & Gates to Blanchard

in payment of a Canal boat. I went and found Mr. Philley and he consented that the said payments should be applied on the notes and we gave him up one note and endorsed the balance on another note. The note now offered is the one on which the endorsement was then made. (Here the petitioner offered the said note with the endorsement thereon in evidence which was objected to by defendants' counsel, but the objection was overruled by the Court and said note with the endorsement thereon which are as follows:

"Chicago Sept 1st 1854

\$300.00. On or before the first day of Nov. next we jointly & severally promise to pay Joseph Blanchard or bearer three Hundred dollars
Gunn & Gates

By W. H. M. Neal, agent

(Endorsed)

Gunn & Gates Note

\$300.00

Nov. 7th 1854. Red. on the within note two hundred and sixteen dollars \$216.00.

Nov. 25. 1854. Red. eighty four dollars in freighting for Canal boat Falcon being the balance of the within note \$84.00

Joseph Blanchard"

for the purpose of explaining the application of the payments, but not for the purpose of showing indebtedness or consideration permitted to be read in evidence, to which ruling of the Court the defendants by their counsel then & there excepted) The note given up to Philley was for \$300. At the time of this arrangement I had heard that Gunn & Gates claimed a failure of consideration as to said notes. The deed of assignment made by Gunn & Gates was acknowledged before me as Justice of the Peace. The petitioner

Know of the assignment at the time of the endorsement on the notes. I did not read the assignment and did not know its provisions.

The Petitioner then produced Henry Beebe, a witness who being sworn testified that he worked on the warehouse of Gunn & Gates while the same was building, and went once or twice to the lumber yard of petitioner and picked out lumber for said warehouse; knows that a considerable portion of the lumber in warehouse was got at Blanchard's yard.

The petitioner here closed his case.

The defendants then produced the following note with the endorsements thereon:

Chicago Sept 1st 1854

\$ 300.00 On or before the first day of Nov. next we jointly & severally promise to pay Joseph Blanchard or bearer three hundred dollars

Gunn & Gates

By H. H. McNeal, agent.

(Endorsed)

Gunn & Gates Note

\$ 300.00

Nov. 7th 1854. Red. on the within Note two hundred and sixteen dollars \$ 216.00.

Nov 25. 1854 Red. eighty four dollars in freighting for Canall Boat Falcon being the balance of the within note \$ 84.00

Joseph Blanchard

which were read to the jury.

The defendants then introduced in evidence the deed of

assignment of Gunn & Gates, which was as follows:
 This Indenture made and entered into this sixth day of
 September A.D. 1854 between Frederick R. Gunn and Samuel
 Gates composing the firm of "Gunn & Gates" of the town of
 Chillicothe in the County of Peoria party of the first part
 and Sylvester C. Philley of said town of Chillicothe party
 of the second part witnesses, that the said party of the
 first part for and in consideration of the premises hereinaf-
 ter set forth and of the sum of one dollar to them in hand
 paid by the said party of the second part (the receipt of
 which is hereby acknowledged) do hereby grant bargain
 sell convey confirm assign transfer and set over unto the
 said party of the second part to his heirs and assigns
 all of the following described real estate, personal property
 goods and chattels choses in action, rights credits and
 effects to wit: All the right title interest or estate of the
 said party of the first part in and to lot numbered two
 (2) in block numbered forty six (46) Also Lots numbered
 eight (8) in block numbered one (1) and lots numbered
 two and three in block numbered thirty nine (39) all
 lying and being in the town of Chillicothe in said
 County of Peoria and State of Illinois Together with all
 the buildings improvements and appurtenances thereunto
 belonging or in anywise appertaining. Also all the goods
 wares merchandise, personal property and effects of what-
 ever name nature or kind owned by the said party of
 the first part now in the store occupied by them as a
 Dry Goods store and situated on said lot No eight in
 Block No one in the town of Chillicothe, the said property

consisting principally of a stock of dry goods, Groceries Queens ware, wooden ware, boots and shoes, hats and caps, millinery goods &c. &c. Also all the goods, wares merchandize, personal property and effects of whatever name nature or kind owned by said party of the first part and in the hardware store occupied by them in said town of Lehigh (being the same property store formerly occupied by Oakford & Co) the said property consisting principally of a general assortment of Hardware and tin ware stores &c. &c.

Also all the lumber owned by the party of the first part on lot No eight in Block No one in said town of Lehigh. Also all the oats and corn and other grain and the Hay and Grain scales with all other personal property of whatever name nature or kind now in the warehouse of the said party of the first part on lot No two in block No forty six in said town of Lehigh. Also the Canal Boat called the "Falcon" (now on a voyage to Saint Louis Mo) together with her apparel rigging and furniture. Also all the grain loaded upon the said Canal Boat Falcon and shipped thereon from said Lehigh to the Port of Saint Louis Mo. and consigned to W. L. Ewing & Co of said Saint Louis for sale, the same being about sixteen hundred bushels of corn and about five hundred and eight bushels of wheat. And in case the said Canal Boat or the said grain or either shall have been sold by said W. L. Ewing & Co. under instructions from the party of the first part heretofore given, then the party of the first assign and transfer the proceeds of such sale or sales in lieu of the said Boat or grain or both if sold.

Also one one horse buggy and harness, the property of the party of the first part. Also all the notes, due bills and demands mentioned and described in schedule of Notes hereto attached marked "A" and made part hereof.

Also all the accounts debts, demands and choses in action mentioned and described in schedule of accounts hereto attached marked "B" and made part hereof.

Also all property real personal and mixed of whatever nature or wherever situated belonging to the said firm of Gunn & Gates or in which they have any interest whatever. Also all debts dues demands choses in action, rights credits and effects belonging to said firm of Gunn & Gates or in which they have any interest whatever. But this conveyance is upon the trusts and for the purposes following, that is to say. Whereas the said Gunn & Gates are indebted to numerous persons and in large amounts and not being able to pay the whole amount of their said indebtedness, and being desirous of closing their said business as speedily as possible and of paying their said creditors as hereinafter provided. Now therefore this Indenture further witnesseth: that the said party of the second part shall immediately and without delay take full and complete possession of all the said property, choses in action rights credits and effects, and shall proceed with all due dispatch to sell all the aforescribed property either at public or private sale for the best price that can be obtained for the same in cash using his best judgment and discretion as to the time mode and manner of such sale. That said party of the second part shall also with as little delay as possible proceed to collect all notes accounts and debts

due to said firm of Gunn & Gates. It being the true intent and meaning hereof that said party of the second part shall as soon as convenient and with as little loss, cost or charges as possible convert the entire effects of the said firm of Gunn & Gates into cash. And out of the money collected as aforesaid or arising from the sales of property as aforesaid the said party of the second part shall pay first; all necessary and reasonable expences of this trust together with a reasonable compensation to him the said party of the second part for his trouble and services herein and under this deed.

Second said party of the second part shall pay to the said several persons and firms named and mentioned in schedule of preferred creditors hereto attached marked "C" and under part hereof, the full amount of their several debts respectively provided there shall be a sufficient amount realized out of and from the effects hereby assigned to pay the said debts in full; but in case there shall not be a sufficiency for that purpose, then said party of the second part shall pay the said several debts of the said several persons in said Schedule mentioned pro rata according to their debts.

Third said party of the second part after paying all reasonable expences growing out of the ^{execution of} trusts hereby created and after paying said creditors the full amount of their demands mentioned and named in schedule marked "C" shall pay all the remaining monies in his hands arising out of the effects hereby assigned to all other creditors of said firm of Gunn & Gates pro rata according to the amounts of their

several debts, and if there shall be a sufficiency of assets in his hands for that purpose, shall pay the said remaining creditors of said firm in full of their respective demands. Fourth If there shall be a surplus left after payment of all creditors of said firm of Gunn & Gates as provided in Item third hereof the full amount of their debts, then said party of the second part shall render and pay such surplus remaining in his hands to said party of the first part to their heirs and assigns. The said party of the second part shall do all necessary acts and things for the protection and preservation of the property hereby assigned and the expense and necessary costs and charges of such acts and doings shall be deemed and considered as the expenses of this trust.

The said party of the second part hereby agrees that he will well and truly comply with the terms and conditions of this deed and will well and truly do and perform all acts required of him by virtue hereof. In testimony whereof the said parties have hereunto set their hands and seals the day and year first above written.

In presence of
 Corin G. Pratt }

F. R. Gunn Seal
 Samuel Gates Seal
 S. C. Philley Seal

State of Illinois

Peoria County }

This day personally appeared before me the undersigned a Justice of the Peace within and for said Peoria County Frederick R. Gunn and Samuel Gates parties of the first part to the above deed of assignment and who are personally known to me to be the same identical persons whose names are subscribed to the said deed and

acknowledged the execution thereof as their voluntary act and deed for the uses and purposes therein expressed. Given under my hand and seal at Chillicothe in the said County of Peoria this eighth day of December A.D. 1854.

John C. Follitt *J.P.*

State of Illinois

Peoria County } This day personally appeared before me the undersigned a Justice of the peace within and for said County of Peoria Sylvester L. Philley whose name is subscribed to the above deed of assignment as party of the second part and who is personally known to me to be the identical person whose name is so subscribed and acknowledged the execution thereof as his voluntary act and deed for the uses and purposes therein expressed. Given under my hand and seal at Chillicothe in said County this eighth day of December A.D. 1854.

John C. Follitt *J.P.*

List of notes Receivable

1	Note of Joseph Cox dated Aug 14/54 due	33.13
2	do " Alfred Pattadee " Aug. 15/54 due	7.99
3	do " Samuel Robinson " " 15/54 due	28.44
4	do " Jacob Wilkinson " " 17/54 "	4.46
5	do " Wm H. Rutherford " 17/54 "	6.17
6	do " Thos. Friday " Oct. 2/54 "	3.75
7	do " B. F. McNeal " July 28/54 "	56.00
8	do " Daniel Mounts " Oct. 16/54. "	7.12
9	do " Miriam Bliss dated Dec. 4/54	
	due Mch 4/55	8.00

Witness to nine items above attached to deed of assignment when executed and acknowledged this 8th day of

Schedule of Notes marked "I"

December A D. 1854

John L. Folliott

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List of notes and accts.

Schedule of accounts marked "B"

	Dr bal
Wm. S. Strother	50 90
John L. Kinney	6 79
Hiram Bliss	118 59
John R. Smith	20
James R. Miff	4 00
A. J. Rugg	33 28
J. O. Tomlinson	211 44
George W. Wicks	1 00
John Wixen	74 39
Thomas Chambers	60
Solomon Mantzell	7 10
Miss Rosanna Beck	2 35
Nicholas Klinger	3 80
James W. Brown	33 91
And Pittman	7 36
Thomas V. Outright	37 19
Wm P. Howe	46 13
James Benyan	5 55
Joseph Atwood	3 22
Wm Oakford	4 90
Josiah Moffitt	1 50
James Colwell	22 28
Wm H. Meyers	36 85
W. Holman	11 07
Edward Aspinall	50
Herman Goodsell	21 29
Hiram Atwood	44 47

E. L. Root	71.56
Erastus Reed	24.86
Wm. Hunt	3.75
Phillips Nolin	32.58
George Woates	3.80
J. W. Montchenson	7.67
Alonson Vantassell	18.89
Isaiah Darby	27.60
Jessie Moffitt	27.90
Levi Learler	20.11
Wm Howard	40.44
Elias Grabill	12.50
Mrs H. Cleveland	14.34
Paul P. Perkins	7.00
Alfred Root	49.29
James Pratt	2.10
B. F. Warner	112.15
H. A. Raney	15.87
John C. Falliott	8.07
Freeman (Elder)	21.71
Aunt. for	
Aunt. Brot over	
Mrs Nibels	2.01
Thomas Hagan	14.78
Ashill Willmot	108.46
David Van Tassell	3.51
Lilas Trimble	7.63
Newton Kiger	2.10
M. E. Kellogg	4.88

Benj. F. McNeal	94.02
Richard Scholes	3.20
J. B. Wilmut	11.19
Seth Curtis	11.02
Hugh Moffitt	19.86
Nelson Alvord	55
Wm. Matthews	25
John Hutchinson	17.30.
Layton	8.25
Moses Ray	9.80
Thomas McConney Jr.	16.45
James H. Mc Kean	49.51
Theodore Howe	9.57
Edward Kindred	15.58
Wm. Lefler	10.35
George Evans	17.31
J. D. Furbrush	35
Daniel Furbrush	39.79
John M. Robinson	53.67
John Fargeson	1.50
W. H. Nicholas	8.20
Orin Powell	6.76
Jackron McCully	7.97
H. Moffitt	55
Lewis Foster	7.33
James Giffill	3.85
Reuben Sprague	6.40
Levi Booth	61.15
Elizabeth Hoffman	3.20

David Terry	3 50
Mershaeh Scholes	4 90
Wm Turk	5 30
Hugh C. Moffitt	1 25
C. P. Billon	27 00
Lyman Robinson	3 05
John Davidson	101 36
George Brewer	6 65
Gershom Martin	23 23
Hiram N. Mead	9 45
Amt for?	
Amt Boot ford	
Abram Gates	1 75
George Morgan	4 00
H. W. Mc Fadden	4 38
Robert Foster	37
Anson Rotherford	10 50
John Dixon	17 21
Jacob Booth	29 69
Mr. P. Campbell	17 71
John G. Kindall	6 88
Alfred Satterlu	16 34
Joe Riley	1 60
Abner Broom	5 00
Edwin Church	32 44
Wm. S. Bates	5 84
Jer Brook	1 80
Wm Hibbens	42 22
Clark agt J. Scales	7 40

Abraam Scott	34.05
Lewis Foster	10 79
Enoch Hutchinson	11.15
Wm Holshaw	14 15
Edward Neil	6 99
Thomas Dixon	8 00
D. F. Grash	102 35
R. Heaton	15 78
A. J. Murray	10.75
Wm Eads	12 90
R. J. Green	45
Joe P. Parsell	26 62
Jacob Wilkinson	16 54
Wallace Gates	5 00
A. W. Sumner	1 33
Saml. Robinson	3 57
George Russell	22.53
Lucius Root	33 06
A. S. Ricker	64.38
L. M. & S. C. Curtis	15 20
Henry Gilfillen	4 15
James Bates	93
D. B. McMaster	13 78
S. C. Peirce	14.38
Aunt. Brod. for?	
Joseph Twisher	16 25
Scholes & Matthews	4 64
And. Weaver	4 64
Unc Ray	4 31

Wm. Putnam	16.63
1st Baptist Church	13.23
Wm G. Reed	17.53
Allison Philley	11.72
Wm Hancock	25.98
Daniel Mounts	14.74
Linus Scovill	14.00
John Butts	3.90
H. J. Johnston	15.20
Oliver Shull	6.30
Nathaniel Chapin	8.90
Joseph Siddons	12.54
Alvin Goodsell	5.06
Thomas A. Colwell	24.42
Samuel Peirce	11.00
John Dowdle	6.87
Orin Booth	18.78
Charles Meats	80
Wm M. Davenport	4.71
Henry Beebe	29.78
James W. Nichols	11.40
Mrs Mary Cleveland	14.33
Miss Mary Beck	10.81
Joseph Goddard	8.68
Dennis Noel	8.80
W Beck	20.57
John Hammitt	3.65
Cynthia Thomas	2.18
Godolbe Donath	12.20

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Solomon Frary	1.50
James Dawson	1.53
James Hamilton	1.73
David Lavisier	41.67
J. B. Drake	6.59
John H. Batchelder	9.00
Nancy Hutchinson	2.52
S. B. Frary	10.21
Lee Hollister	12.25
John Bixler	8.82
Geo H. Hoyt	14.55
Jackson Hutchinson	3.05
Boat for d.	
Solomon Howell	12.50
Robert Wills	1.30
Joseph Warner	11.56
Wm Dittman	14.35
Jos. Blackburn	77.25
Abner Alday	9.80
John Davison (B. H.)	5.49
Jeremiah Moffitt	4.80
Thomas Galvin	7.95
James B. Niff	35.62
Walter L. Evans	62.05
Francis Thomas	9.33
Benj. Dillworth	3.58
John Moffitt	90
Ellihu Francis	20.20
Ezra Lamore	3.05

Franklin Robinson	8 25
John Simpson	1 50
Graves & Morris	5 75
Abner Haskins	23 88
Wm Canterbury	19 43
C. C. Allen	3 37
Saml. Sylvester	4 70
Wm Mooney	2 25
John Wood	12 80
Albion Hurd	5 50
Wm Groom	7 25
Ely Stowell	1 01
J. J. Moffitt	49
Nathan Gates	24 90
Geo Gilfillen	7 00
James Jackson	110 52
Isaac Blanchard	423 53
O. W. Young	13 45
T. L. Potter	4 60
John Evans	2 00
Albin Cphy	5 45
Wm Pickles	32 50
D. C. Hodges	1 70
C. A. Fox	2 90
Aunt ford	
Aunt ford.	
C. H. Blue	63
Aaron Gilfillen	2 35
Burton Miller	26 20

S. W. Clifton	2.95
 Aaron Gilfillen	2.35
J. H. Dawson	2.35
Saml. Hallett	3.95
Hardware a/c	
Thomas Homer	20
Saml. Gates	18.96
Putman	28
Arthur L. Ricker	3.40
C. C. Allen	3.85
Hiram Atwood	1.25
Henry Robinson	2.75
John Wixon	6.25
Edward Kindred	24.60
E. C. Root	1.10
Alfred Root	3.70
Cyman Robinson	32.44
H. W. Mepherd	60
Wm. Hibbins	25
Edward Aspinall	1.50
J. H. Temple	65.18
R. Heaton	31.50
Dr. Raney	1.32
James Kingan	12.00
W. Hunt	24.60
J. H. McKean	1.73
Mc. Bales	94.13
Ruben De Beebe	2.23
Nathan Gates	3.28

H. H. McNeal

43.00

A. Weaver

95

Joseph Tilliman

2.45

Schedule of Preferred Creditors

marked "C"
 Attached to deed of assignment when executed & acknowledged this
 8th day of December A.D. 1854. Witness John C. Follitt

Schedule of Preferred Creditors

152.00

marked "C"

Schedule of Preferred Creditors marked "C"

1 Henry Kench

146 42

2 James Smith

33 11.

3 Stephen Nichols

6 41

4 Sanford Reed

195. 43

5 Nathaniel Smith

481. 31

6 D. C. Morris Moore

67 84

7 Thos. D. Halsted

144. 28.

8 Allen Briggs

34. 40

9 Saml. Guly

153. 09

10 L. C. Wilton

48 03

11 B. A. Hill

279 47

12 Moses Jenkins

218 07

13 Arche Riddle

350 50

14 James H. Temple about

100 00

15 John Unger about

225 00

16 Royce (Prot Bill)

71. 41

17 Alvin Goodsell

95.00

18 Bart Halsted about

150 00

19 L. P. Billon about

100 00

20 Henry Nolte (Mortgage M Reed)

592. 57

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21. Cooley Wadsworth & Co	1. 362. 07
22 C. N. Henderson & Co about	700. 00
23 John McCully	5000
24 Abner Alday	7500
25. Saml. Halsey	20000.

Witness to twenty five names above attached to assignment
 made when executed and acknowledged this 8th day of December
 A.D. 1854. John L. Polkott

The defendants then introduced in evidence the following
 bill exhibits and decree;

State of Illinois } To the Honorable Charles Peters
 Peoria County } as Judge of the Circuit Court of the 16th
 Judicial district in said State in Chancery

The petition of Charles W. Pierce, Leister M. Clark, William
 M. Blanders composing the firm of Pierce, Clark & Co.
 Charles N. Henderson, Elisha J. Wadsworth, Franklin Cooley
 John Farnell composing the firm of C. N. Henderson & Co
 and Allan Hunter on behalf of themselves and others, the
 creditors under & interested in the assignment hereinafter
 mentioned respectfully represent to your honor that on or
 before about the 6th day of December A.D. 1854 the firm
 of Gunn & Bates consisting of Frederick R. Gunn & Samuel
 Bates of the town of Chillicothe County & State aforesaid
 being indebted to numerous persons and firms residing in
 said Peoria County & in the Cities of Boston, New York
 Chicago & St Louis in large sums of money amounting
 in the aggregate to the sum of twenty three thousand dollars
 upwards and being wholly unable to pay said debts,

as the same became due & payable, made a voluntary assignment of the property real & personal of said firm to one Sylvester L. Philley, as assignee to be disposed of by said assignee and the proceeds applied to the payment of said debts in manner directed in said deed of assignment for a more full & detailed account of the terms of said assignment, the property embraced therein, the disposition to be made of it, application of proceeds & powers & duties of said assignee petitioners refer to said deed duly executed and acknowledged under the hands & seals of the said Frederick R. Gunn & Samuel Gates, dated the 6th of December 1854. which will be produced in evidence on the hearing of this petition and which petitioners pray may be considered & taken as part of this petition. Petitioners further represent that they are all interested in the due execution of the said assignment, and the powers, duties & trusts conferred thereunder. That your petitioners composing said firm of Pierce Clark & Co are creditors of said Gunn & Gates to the amount of \$ 1037. $\frac{68}{100}$ secured to them by the note of said Gunn & Gates dated September 6th 1854, and said L. N. Henderson & Co in the sum of \$ 460. $\frac{75}{100}$ secured to them by the note of said Gunn & Gates dated July 13th 1854, which said notes will be read in evidence on the hearing, and neither of which nor any part thereof has been paid. And said Hunter is interested as creditor and also as purchaser under said assignment in the manner to be hereafter stated. Petitioners further represent that immediately upon the execution of said deed of assignment the said Sylvester L. Philley entered upon & into possession of the property assigned, and upon the discharge of his duties of his office as assignee as aforesaid. And petitioners

state generally, that said assigned property consisted of a large lot of goods, wares & merchandize embraced in two stores owned by said Gunn & Gates and valued at the sum of about \$10,000. Grain, Lumber & other loose property valued at about the sum of \$3,000. notes, book accounts & other evidences of debt to about the sum of \$3,000. a canal boat valued at \$1,000. and the following real estate viz: Lot Two (2) in Block Forty Six (46), Lot Eight (8) in Block One (1) and Lots Two & Three (2 & 3) in Block Thirty Nine (39) all in said Town of Chillicothe and estimated to be worth the sum of \$7,000. And your Petitioners show that the legal title to all of said property, real & personal so far as the same can be transferred was placed by said Assignment and now is vested in said assignee except so far as sales have been made of personal property & delivery thereof as herein stated. — Petitioners further represent that in prosecution of said trust and of his duties under said Assignment said Assignee sold & disposed at retail of a portion of said personal property amounting to about \$25.00. Most of which has been applied in payment of certain preferred creditors under said assignment and that certain other sales of portions of said personal property have been ~~much~~ made amounting after deducting costs to about the sum of \$21.00 but the disposition of the proceeds of which has not yet been definitely ascertained. — Your Petitioners further represent that very little has yet been collected of the debts due said firm of Gunn & Gates and embraced

in said assignment and that nearly the whole amount remains outstanding & uncollected, and that there is still some portion of the goods & wares & Merchandize still remaining on hand & undersigned of. Petitioners further show that subsequent to said assignment and with the consent and approval of said Gunn & Gates of the creditors interested in & under the same, the said assignee sold and delivered to your petitioners Allen Hunter, Goods wares & merchandize part of the goods embraced in & covered by said assignment to the amount of \$7,236.42 on a credit of one year and for the payment of which said Hunter gave and is to give his promissory note; said sale was made & bears date on the 15th day of January AD 1855 and at the same time and with like consent of said creditors and said Gunn & Gates said assignee negotiated for the sale to said Hunter of said lot two in Block forty six for the sum of \$3,500, and said lot eight in Block one for the sum of \$1,000. said sums to be paid in equal instalments of \$15.00 each in three nine & 15 months with interest on the last payment after nine months; and said Hunter was immediately put into possession of said lots, ^{as} sold to him as aforesaid and still is in possession & occupancy of the same. And petitioners show that no deeds for said lots or either of them have been made to said Hunter by said assignee in compliance with the terms of said sale. and that the legal title thereof is still in ~~in said assignee~~ ^{petitioners further state that} said Sylvester L. Philley assignee as aforesaid. And petitioners further state that said Sylvester L. Philley assignee as aforesaid has left the State of Illinois and is now, as petitioners are informed & believe & therefore

change on his way to the State of California wholly giving up & abandoning the further execution of said trust, and failing neglecting & refusing further to fulfil the duties pertaining to him as assignee as aforesaid. Your petitioners represent that a large amount of the debts due to said firm of Gunn & Gates are still uncollected & that a small portion of the personal property covered by said assignment & subject to sale by said assignee is still undisposed of, and that of the whole amount sold on time to said Hunter & others, no part has yet been paid in and applied under said assignment, and that the interests of your petitioners and other creditors are liable to suffer irretrievable injury for the want of some suitable person legally authorized to execute said trust & carry out the purposes of said assignment. Petitioners also state that said Hunter is entitled to his deeds for the real property sold him as aforesaid which he cannot obtain save through the interposition of this Court, and that the residue of said real property embraced in said assignment & worth from fifteen Hundred to two thousand dollars, cannot in the absence of the said assignee be sold & the legal title conveyed save through the like interposition of this Court. Your petitioners further represent that in the confused state of the business of said Gunn & Gates, it has been found and is difficult to determine the amount of debts actually due & owing by said firm and that the services of a competent assignee are much needed to prevent fraudulent & extravagant claims from being established and made charges upon said assignment. Petitioners further show that the creditors of said firm already known, are so numerous, that they cannot be all made parties complainant herein, without greatly incumbering the

record and rendering it extremely inconvenient & expensive to
 proceed with said suit. Inasmuch thereof as your petitioners
 cannot have adequate relief at law and are only relievable in
 a Court of Chancery, your petitioners pray that said Frederick
 R. Gunn & Samuel Gates and Sylvester C. Philley may be
 made parties defendant to this bill and duly notified to ap-
 pear ~~and~~ & answer the same and the several charges & allegations
 thereof, but not under oath, their oaths being waived. That the
 authority of the said defendant Philley may be revoked annulled
 & held for naught and the title to said real estate property
 so remaining in him as aforesaid may be divested by the order
 & decree of this Court, that a new assignee be appointed to
 take his place and execute the remaining duties of said trust
 with full power to sell and convey the said lots two & three in
 Block thirty nine in said town of Chellicoth in accordance
 with the terms of said assignment, and to execute to said
 Hunter a deed or deeds for said lots eight in block one and
 two in Block forty six so bargained & sold to him as aforesaid
 and generally to do & perform all other acts & things to be
 done & performed under said assignment in as full ample &
 complete a manner as the said Sylvester C. Philley might or could
 have done had he continued to act under the said assignment.
 And your petition pray for such other & further relief as to
 your Honors may seem meet and the nature & circumstances
 of the case may seem to require and as in duty bound
 Petitioners will ever pray &c. Purple Langer & Pratt &
 Coopers & Reynolds for petitioners

answer Charles W. Pierce &als } May Term A.D. 1855

vs

In Chancery

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Sylvester W. Philley &als } The separate answer of Frederick R.
Gunn to complainants bill of complaint herein. This respondent
for answer to said bill or so much thereof as he is advised it is
necessary for him to answer unto, answering says, That it is true
the firm of Gunn & Gates were indebted and made an assignment
as set out in said bill & for the purposes therein stated and
that said complainants with others are creditors of said firm
and interested in said assignment, that said Philley was
appointed assignee and entered on the discharge of his duties
as such, and that the title to said assigned property was by said
assignment transferred & passed to said assignee, that said assignee
proceeded to act under ^{said} the assignment and partially executed
the same; that sales were made to said Hunter with the
consent of said creditors & said Gunn & Gates, and that said
Hunter was put into possession of the property sold to him as
set out in said bill, that no deeds have been executed to
said Hunter for the real property sold to him and that the
legal title is still in said assignee. That said assignee has
left the State of Illinois and abandoned the further execution
of the duties of his said trust and that the said assignment
is still in part unexecuted as stated in said bill. Respondent
further admits that the rights & interests of petitioners & other
creditors are exposed to loss & injury by reason of the default
of said assignee & the want of a suitable person to represent
said assignment and carry out & execute the same. And
Respondent further admits all the other charges & allegations
of said bill not herein specially referred to & admitted.

And having fully answered respondent prays to be
hence dismissed with his costs. Frederick R. Gunn.
by People, Sanger & Pratt his Solicitors

decree

Charles W. Pierce & als

^{vs} Sylvester C. Philley & als } In Chancery
for removal & c of assignee

And now this cause coming on again to be heard upon
the report of the master herein and the oral & documentary
proofs submitted to the Court and it appearing to the Court
from said report & proofs that said defendants Gunn &
Gates are indebted & have made the assignment for the
benefit of creditors in said petition mentioned. That
Petitioners are creditors of said firm & interested in said
assignment. That said defendant Philley was duly appoint-
ed assignee in & by said assignment and entered upon &
partially executed the duties of said trust, that the business
of said assignment is still incomplete, that said assignee has
left the State of Illinois & abandoned & given up the further
execution of said trust and that in consequence thereof and
for the want of a suitable person to exercise said trust, the
rights of creditors & others interested in & under said assign-
ment are placed in jeopardy. And it further appearing to the
Court that a large part of the debts due said firm and
embraced in said assignment viz: about the sum of \$2800.00
is still uncollected. That the legal title to real estate in said
petition named to wit Lots eight (8) in Block one (1) two
& three (273) in block thirty nine (39) & two (2) in block
forty six (16) all in the town of Chillicothe, County of Georgia

& State of Illinois was passed by said deed of assignment & vested in said Sylvester B. Philley as assignee for the benefit of the creditors of said firm, that said Lot eight in Block one and lot two in Block forty six were sold to said Allan Hunter as stated in said petition, but that no deeds have been executed to said Hunter therefor by said assignee, and that said Hunter is ready & willing to perform his part of said contract of sale. And it further appearing that said Hunter purchased goods pertaining to said assignment to the amount of \$4236.42 and that the greater part of the purchase money for said lots & goods is still outstanding & unpaid. It is therefore ordered adjudged & decreed by the Court that the appointment of said Sylvester B. Philley as such assignee be set aside & annulled, and his powers under & by virtue of said appointment be revoked & cancelled except that the said assignee be required to convey by suitable deeds the said lots 8 in block 1 & 2 in Block 46 to the said Allan Hunter within ten days from the date of this decree upon the said Hunter executing to the assignees hereinafter named his notes for the residue of the purchase money of said lots yet unpaid, according to the terms of sale to him as aforesaid, and that in default thereof the said assignees hereinafter named be & they hereby are appointed commissioners to make execute and deliver such deed or deeds conveying to said Hunter the title thereto so vested in said Philley as aforesaid. It is further ordered that upon sale of the remaining lots hereinbefore named the said Philley make & deliver to the purchaser or purchasers a deed or deeds therefor, and that in default thereof the assignees hereinafter named as commissioners as aforesaid make such deeds & convey to said purchaser or

purchasers the said title so vested in said Philley as aforesaid. It is further ordered & decreed by the Court that Jonathan H. Cooper & Lorin G. Pratt be & they hereby are appointed assignees to replace said Sylvester L. Philley and that they be authorized, empowered & required to proceed & carry out the said assignment and do & perform all and singular the matters & things remaining to be done under the same and necessary to perfect & conclude the said assignment, and necessary & proper to be done to secure protect & advance the just rights of all persons interested in the said assignment and entitled to receive & take under the same. It is further ordered that the costs of this proceeding be paid out of the proceeds of said assignment, and that on the winding up & closing of said business said assignees make report of their actings and doings under their said appointment to this Court for its confirmation & approval.

Which were read in evidence:

The defendants then produced Henry H. McNeal a witness who being sworn as to ~~the~~ his interest in the result of this suit testified that he was not in his opinion interested in the event of this suit; that on the formation of the Copartnership between Gunn & Gates it was agreed between them that witness should be kept as general agent and manager of said firms business in place of Gates, that Gates owned a two thirds share in said partnership, and that after the formation of said partnership it was agreed between Gates and the father in law of witness that witness should receive for his services one third of the profits of said firm or one half of Gates share of profits. That witnesses father in

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law paid Gates \$200, and gave him his note for \$30. more for such interest in the profits of the firm, that Gunn knew nothing of the arrangement but it was made with Gates personally. The defendants then produced in evidence the release of said witness which is as follows to wit;

Know all men by these presents that J. H. H. McNeal for value received do hereby release ^{to} Frederick R. Gunn & Samuel Gates and to Jonathan K. Cooper & Lorin G. Pratt the assignees of Gunn & Gates all interest of any & every kind which I now have or hereafter may have in the partnership heretofore existing between Gunn & Gates or the interest of either of said partners, or of said assignees in the property or effects of said firm in the hands of said assignees or otherwise and also all right ^{or} ~~and~~ claim I may at any time have to recover or receive from said Gunn & Gates or either of them or from said assignees in any surplus that may remain after paying the debts of said firm under said assignment and which surplus would be payable over to said Gunn & Gates. In witness whereof I have hereunto set my hand and seal this 26th day of November 1856

J. H. H. McNeal 

The Petitioner then objected to said witness as being incompetent because interested in the event of this suit; which objection was sustained by the Court and said witness excluded; to which ruling of the Court in sustaining said objection and excluding said witness the defendants then and there excepted.

This was all the evidence in said cause

The Petitioner then asked the Court to instruct the Jury as follows to wit:

1. If the Jury believe from the evidence that the petitioner furnished lumber and materials for the defendants Gunn & Gates as charged in the Petition, under a contract with Gunn & Gates, the jury should find for the petitioner the amount or value of the materials lumber &c furnished by him less any payments made & proved by the defendants.
2. The Jury may allow the petitioner interest on the amount found to be his and if they should further find that there has been an unreasonable and vexatious delay on the part of the defendants Gunn & Gates in making payment.
3. This proceeding is not a proceeding to adjust conflicting accounts between Gunn & Gates & the petitioner and the only matter proper for the consideration of the Jury is to enquire whether anything is due to the petitioner on the lumber mentioned in his account attached to and made part of his petition, and if so how much? If the Jury believe from the evidence that there have been payments made to the petitioner to apply on the lumber in controversy

such payments should be allowed and deducted from the whole amount of the lumber furnished.

4. If the Jury believe from the evidence that Tilley acted as agent or clerk for Gunn & Gates & had authority to make settlements and entries in the books of the firm; and if the Jury believe further from the evidence that Blanchard and Tilley settled the accounts & applied the amount on the notes, this settlement would be binding on ^{Gunn & Gates} Gunn & Gates.

5. If the Jury believe from the evidence that a settlement was made between Tilley as assignee agent or clerk of Gunn & Gates and Blanchard and in the settlement Blanchard delivered up to Tilley Gunn & Gates note for \$300. and if the Jury further believe from the evidence that said note has been in possession of the defendants without objection for over a year this would be proper evidence to be considered by the Jury in finding that the settlement made was approved of by the parties in interest.

6. If the Jury believe from the evidence that Tilley was the assignee of Gunn & Gates and acting as such and while so acting as assignee having the books accounts and assets of said Gunn & Gates in his possession consented to take the \$300 note from Blanchard as part payment of demands against Blanchard and also consented to the endorsement on the other notes, then in that case the said \$300. note and said endorsements should be allowed as a credit to Blanchard."

To the giving of which said instructions and each and every one thereof the defendants objected, which objection was overruled by the Court and said instructions given to the Jury as asked to which ruling of the Court in overruling said objection and giving said instructions to the Jury the defendants then and there excepted.

The defendants then asked the Court to instruct the Jury as follows:

1st. It is not enough that the petitioner prove to the satisfaction of the Jury that he sold lumber to Gunn & Gates in order to maintain his case; he must prove in addition to that fact that he sold said lumber for the sole and express purpose of erecting the buildings in the petition described, and further that such lumber was applied towards the erection of such building; and if the Jury should believe that only a part or portion of the lumber sold by Blanchard to Gunn & Gates went into the said buildings then the Jury should find only for the amount proved to have been used in the erection said buildings.

2nd If the Jury believe from the evidence that all the lumber sold and delivered by Blanchard to Gunn & Gates was delivered more than six months prior to the 2nd day of May 1855, and that by contract between Blanchard and Gunn & Gates such lumber was to be paid for when delivered, and if the Jury further believe that the defendant Hunter prior to the commencement of this suit purchased the property in the petition mentioned without actual knowledge of the petitioners claim, the Jury should find for the defendants.

6. The answer of the defendants to the petition herein so far as the same is responsive thereto is evidence and unless disproved by the testimony of more than one witness or by evidence stronger than the testimony of one witness should be regarded by the Jury as true.

7. Philley as assignee had no authority to change the application of payment made before his appointment as assignee, and any act of that kind would be beyond his authority and void.

Which said instructions the Court refused to give; to which refusal of the Court in refusing to give said instructions the defendants then and there excepted. The Court then at the request of the defendants gave the following instructions,
 " 3. If the Jury believe from the evidence that the \$216. was originally paid by Gunn & Gates on the account of lumber purchased by them of Blanchard, And that after the assignment was made Blanchard and Philley agreed that such payment should be applied on the note given in evidence and that this was done by Blanchard with full knowledge of the assignment, such agreement would not be valid and binding as to other creditors of said Gunn & Gates under the assignment.

4. If the Jury believe from the evidence that at the time of the payment of the \$216. and the freighting of the lumber that neither of the notes held by Blanchard was due, he could not then apply such payment upon said notes if he held an account of lumber against them which was due, and if such payments were first applied to the lumber it could not afterwards be changed by Philley as to other creditors of said Gunn & Gates after the assignment was made.

5. If a creditor holds a claim against a debtor which is due and another which is not due, and the debtor pays money to the creditor, the creditor cannot apply such money to the payment of the debt not due, but must apply it upon the indebtedness due at the time of payment.

8. That if the Jury believe from the evidence that Gunn & Gates advanced to Blanchard \$400.⁰⁰ any other sum to be applied on a bill of lumber and that said bill was not furnished, but another bill of lumber substituted in its place by arrangement between the parties, the jury are authorized to consider such advance as a payment upon such substituted bill, unless they may also believe from the evidence that there was an express agreement between the parties to apply said payment in some other manner.

9. That there is no evidence before this jury that any settlement of the payments made by Gunn & Gates to Blanchard appears upon the books of Gunn & Gates, and if the complainant Blanchard wishes to use said books in evidence it is his right & duty to compel their production.

10. That the consent of Philley to the application of the payments endorsed on the notes is not sufficient to fix that as the true application of said payments, if the jury believe from the evidence that at the time said Philley was the mere bookkeeper & clerk of said Gunn & Gates and had no authority from them to make the application.

11. The Court is asked to instruct the Jury that if they believe from the evidence that the payments made made by Gunn & Gates or any part of them were originally intended to apply on the lumber furnished for the buildings in question, no subsequent application of those payments by the complainant upon other indebtedness is allowable unless the jury shall also believe from the evidence that such change of the application of said payments was made with the express knowledge & consent of said Gunn & Gates or their lawfully authorized agent.

12. That there is no proof before this jury of any other indebtedness of Gunn & Gates to the complainant except for the bill of lumber set out in the bill of complaint, - to be considered by the Jury in this case.

13. That the notes produced are not in evidence before the Jury for the purpose of proving any indebtedness or consideration therefor, but are merely before the Jury for the purpose of showing the endorsements of payments made thereon."

The Jury then returned the following verdict:

"We the Jury find the issues for the petitioner and that there is due him on the contract in the petition specified the sum of six Hundred and thirty two dollars and nineteen cents."

The defendants then moved the Court for a new trial for the following reasons to wit:

Joseph Blanchard	} Circuit Court, Peoria County Ill.
Frederick R. Gurnvale	
	Nov. Term 1856
	Defendants come & move the Court

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for a new trial herein and for cause show.

1. The Court admitted improper evidence on the part of the complainant.
2. The Court excluded proper evidence offered by defendants.
3. The Court erred in the instructions given for complainant.
4. The Court refused proper instructions asked by defendant.
5. The Court erred in excluding the testimony of Henry H. McNeal, a witness offered on the part of the defendants.
6. The Court erred in modifying certain instructions asked by defendants.
7. The verdict of the Jury is against the law.
8. The verdict of the Jury is against the evidence.
9. The Jury ought not have found interest

Cooper & Pratt for defts."

which motion of defendants the Court then and there overruled; to which ruling of the Court, in overruling said motion the defendants by their counsel then and there excepted. The defendants then entered their motion in arrest of judgment herein for the following reasons:

Joseph Blanchard	}	Circuit Court November term A.D.
vs		1856 In Chancery
Frederick R. Gunn & als		for lien.

Defendants come and move the Court for an arrest of judgment or decree ^{in this case} directing the sale of the premises in said petition mentioned and for cause show

1. There is nothing in the verdict of the jury rendered herein to justify such order or decree.
2. From the finding of the Jury it cannot be determined whether any or what part of the lumber sued for was

furnished for or put into the buildings named in said bill.
 3. The finding of the Jury does not show that said debt was a lien upon the premises described in said bill.

Cooper & Pratt for defts

Which said motion the Court overruled and made and entered the following decree: in this cause to wit:

State of Illinois } In the Circuit Court of Peoria County
 Peoria County }

Joseph Blanchard

vs } Petition for mechanics lien
 Frederick R. Gunn }

Samuel Gates & als } This day this case came on to be heard
 and a motion of the petitioner for a decree of this Court enforcing the lien of the petitioner against the defendants in conformity with the verdict of the Jury rendered in this cause on the twenty seventh day of November last, whereupon the defendants entered a motion in arrest of judgment or decree in this cause directing sale of the premises in the petition mentioned for reasons on file, or consideration whereof the Court being fully advised in the premises overruled said motion of defendants in arrest of judgment &c And the Court now being fully advised in the premises find that petitioner did contract with the defendants Frederick R. Gunn and Samuel Gates to furnish lumber materials &c as in said petition alleged and that the petitioner did furnish such lumber materials &c as in said petition set forth. And the Court further find that there is still due to the said petitioner from said Gunn & Gates the sum of six hundred and thirty two dollars and nineteen cents which ought to be and is a valid lien on said

lot number eight in block number one and lot number two in block number forty six in the town of Lehillicothe in the County of Peoria and State of Illinois. It is therefore ordered adjudged and decreed by the Court that there is due to the petitioner the sum of six hundred and thirty two dollars and nineteen cents from said Gunn & Gates for such materials and the same is hereby declared to be a valid lien on said lot eight in block number one and lot number ^{two in block number} forty six in said town of Lehillicothe in Peoria County in the State of Illinois. It is further ordered adjudged and decreed by the Court here that the defendants Frederick R. Gunn and Samuel Gates pay to the said petitioner the said sum of six hundred and thirty two dollars and nineteen cents within twenty days from the making of this decree and that in case said Gunn & Gates should make default and should fail to pay said sum of six hundred and thirty two dollars and nineteen cents to the petitioner within the term limited by this decree then and in that case George S. Blakeley, Master in Chancery in this Court who is hereby appointed a special Commissioner for that purposes shall proceed to sell said lot number eight in block number one, and lot number two in block number forty six, situate in the town of Lehillicothe in the County of Peoria and State of Illinois to the highest and best bidder or bidders for cash after having first given due notice of the time place and terms of sale together with a correct description of the premises to be sold by publication of notice for four successive weeks in the Peoria weekly Republican a newspaper printed and published in the City and County of Peoria and State of Illinois being the nearest newspaper

and of general circulation therein and by posting up similar notices in four of the most public places in the County of Peoria aforesaid. And it is further ordered by the Court that said lots shall be sold separately and in case one of said lots should sell for a sufficient sum of money to pay said petitioners the said sum of one hundred and thirty two dollars and nineteen cents with interest thereon from the date of this decree and the costs of this proceeding, then said Master shall not sell the remaining lot. And it is further ordered that upon making such sale said Master and Commissioner herein appointed shall hold the same at the front door of the Court house in the City and County of Peoria, and State of Illinois between the hours of nine o'clock A.M. and four o'clock P.M. of the day of such sale, and upon making such sale said Master shall issue to the purchaser or purchasers at said sale a certificate of purchase of the premises sold and that the defendants shall have the same right of redemption as though said premises were sold upon execution at law. And that the defendants pay the costs of this proceeding to be taxed,

to which ruling of the Court in overruling the defendants' motion for new trial and in arrest of judgment and in entering the said decree upon the verdict of the jury the defendants then and there accepted and pray that this their bill of exceptions may be duly signed and read which is accordingly done

E. N. Powell (Seal)

And afterwards to wit 29th day of December AD 1856

the defendants filed in the office of the clerk of the Circuit Court in Peoria County their appeal bond in this cause, which is in the words and figures following to wit:

"Know all men by these presents that we Allen Hunter Jonathan K. Cooper, Lorin G. Pratt and Norman H. Purple are held and firmly bound unto Joseph Blanchard in the penal sum of one thousand dollars for the payment of which well and truly to be made we bind ourselves our heirs executors administrators and assigns jointly severally and firmly by these presents. Witness our hands and seals at Peoria this 20th day of December A D. 1856. The condition of the above obligation is as follows to wit: Whereas the said Joseph Blanchard did at the November term A D. 1856 at the Circuit Court of Peoria County in the State of Illinois obtain a certain decree in a certain cause in said Court then pending for mechanics lien wherein said Joseph Blanchard was petitioner and said Allen Hunter Jonathan K. Cooper, Lorin G. Pratt, Frederick K. Gurn, Samuel Gates and Sylvester L. Phillea were defendants for the sum of six hundred and thirty two dollars and nineteen cents and costs of suit from which said decree the said Allen Hunter, Jonathan K. Cooper and Lorin G. Pratt have taken an appeal to the Supreme Court of the State of Illinois Now therefore if the said Allen Hunter Jonathan K. Cooper and Lorin G. Pratt shall well and truly pay to said Joseph Blanchard the said sum of six hundred and thirty two dollars and nineteen cents, according to the said decree together with all costs interest and damages thereon in case the said decree shall be affirmed and shall pay whatever judgment shall be rendered by said Supreme Court herein, and shall also

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duly prosecute their said appeal then this obligation shall be void otherwise to remain in full force and virtue,

Allen Hunter Seal
Jonathan K. Cooper Seal
Lorin G. Pratt Seal
N. H. Purple Seal

State of Illinois
Peoria County

I, Enoch P. Sloan

Circuit Court in and for
Peoria and state of Illinois, do certify that the foregoing is a full and complete transcript of the records in the cause, wherein Joseph Blanchard was plaintiff and Gunn & Gates & als, are defendants, as the same remains of record and on file in my office,

In witness whereof I hereto set my hand and affix the seal of said court at Peoria, this 26th ~~1857~~ day of March, AD 1857 Enoch P. Sloan, clk

State of Illinois
Peoria County

I Enoch P. Sloan clerk of the Circuit Court of said Peoria County do hereby certify that ~~that~~ clause of the Petition copied into the foregoing Record on the third page of foregoing record commencing in the 22nd line of the page with the words "your petitioners further state" and ending on the 27th line with the words "for his said"

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Materials &c. are written on the margin of the original
Petition on file in my office - and that the words "Allen
Hunter Johnathan C. Cooper & Lorin G. Pratt" in
the fifteenth & sixteenth lines of 4th page of foregoing record are
interlined in said original Petition and that those words
interlined as aforesaid and the clause on the margin
of the Petition as aforesaid are in a different handwriting
from the hand-writing of the body of the Petition generally.

In witness whereof I hunt to at my hand
and the seal of said Circuit Court at Florida
this 7th day of April A.D. 1837 -
Enoch Sloan, clk

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Allen Hunter et al
vs
Joseph Blanchard

Filed April 24/1837
L. S. Sloan
Clerk

Allen Hunter
 & others
 m
 Joseph Blouchard } Appeal from
 Poire —

I shall confine my argument in this case wholly to one question, which I think must reverse this Judgment.

Record H. H. McNeal was offered as a
w. 56. Witness by the Defendants below
The Court decided that he
was incompetent on the grounds of
interest, in the profits of the firm
of Gunn and Gates — This was an in-
terest of one third of the profits only
He had no share in the losses. He was
not a partner. He had been fully paid
Gates had given \$200. and his vote
for \$30. for his interest in the profits.

There was nothing more due him
and he had nothing in expectancy, and
was under no liability for the debts
of the firm of Gunn & Gates.

Besides all which, he had made
and executed a release of all his in-
terest (if he had any) to Gunn & Gates
and their assignees.

What possible pretence then can
be that he had an interest in this
suit against Gunn & Gates, and their
assignees — after he had received

his whole pay — all the partnership property had been assigned — and he had released all his interests in it — is not pertinent

Supposing that the exclusion of this matter is sufficient to reverse this Judgment — and all the other questions being fully argued I consider it unnecessary to add any thing more

M. P. P.

Allen Hunter vol
m

Joseph Blanchard

Argument

A. M. Chapple

Allen Hunter }
 Jonathan H. Cooper } Appellants } Supreme Court =
 Lorin G. Pratt } April Term 1857
 vs.
 Joseph Blanchard } Appellee } Appeal from Peoria =

Brief & Argument for Appellants

On the 23rd of March 1855, Blanchard filed his petition against Frederick R. Gunn, Samuel Gates & Sylvester C. Shilly to enforce a claim for \$964.51, under the Mechanics Lien Law, against certain lots in the Town of Chillicothe. The Appellants were brought in by Amended & Supplemental petition filed on the 2nd of May 1855. From the confused state of the record it is not easy to determine the exact order of proceedings but the court will observe that none of the appellants were made parties till the filing of the Amended petition.

The clerk's certificate, at the foot of the record & the fact that they are not named in the original summons, shows that the insertion of their names in the first Petition is surreptitious.

The suit being strictly a proceeding in Chancery, none of the defendants were properly served with process nor at all. But as they all appear & answer, this irregularity is not insisted on.

The first assignment of error, relates to the overruling of demurrer to the original & Amended petitions. The exception, we think, was well taken, upon the ground ^{in part} ~~simply~~ that the contract upon which the sum was furnished is defectively set out. It is nowhere stated at what time, by the original contract, payment was to be made. Nor are the terms of the contract in other respects sufficiently stated. ^{neither} The kind, quantity or quality

The record shows that Gunn & Gates, who were parties in business of property this property, the lots in question included, to Shilly, as trustee, to sell & pay in advance. That Shilly was removed by clearing the circuit court & Cooper & Pratt substituted in his stead to carry out the purpose of the assignment, and that Hunter had purchased said lots.

But perhaps a more conclusive objection to this petition is, that it claims an aggregate sum, ^{any} for materials furnished & used on separate & distinct premises, and this coupled with an allegation that Petitioner has no knowledge of the "precise quantity, quality, ~~or~~ kind or value used on either".

This point seems to be settled in *Steigleman vs. McBride* 17 Ill. 300, to which the court is referred =

of the Lumber to be furnished by the contract, is stated. ^{and} ~~the~~ prices at which the respective kinds were to be furnished, ^{given} nor is any rule mentioned by which those prices were to be fixed - But it is merely stated that Gunn & Gates ^{promised} to pay for the whole amount necessary to erect the buildings mentioned, \$964.51. This, it is submitted, is too loose, and affords no satisfactory means of enabling the ^{or the court} dependants to restrict the evidence to the exact terms of the contract set out in the petition, by which, under the law, the Petitioner must be strictly governed. - Now, we ^{think} does it sufficiently appear when the last lot of lumber was furnished: The statement is merely that it was furnished "between the 13th of July & 4th December 1854" at which last named time, it is said, the Gunn & Gates promised to pay the ^{said} sum of money then due. This becomes important to the ~~dependants~~ ^{Appellants} in view of the limitation of the Statute: These Appellants are bona fide encumbrancers; they are not brought into the suit till the 2nd of May 1855, only two days before the end of six months from the date last above named. As to them the suit was not commenced till the filing of this Amended & Supplemental petition on the 2nd May 1855. Now, if it be held that the lumber was to be paid for on delivery, (and if any time of payment is fixed it is this) then the exact time when the last of the lumber was furnished should have been distinctly set out. It is not enough to say it was furnished between certain days.

On the subject of setting out the Contract the Court is referred to Lojan vs. Denby, 3 Scam. 188: Mullen vs. Smith *ibid.* 544. =

If it be said that the answer put in waives the demurrer, it is replied, that if the Petition be substantially bad for the reasons stated, no decree against the property could be rendered, and this Court will notice the error =

The second assignment of error refers to the evidence admitted for Petitioner to prove a change assigned to by Shilley, the original assignee, subsequent to the assignment, in the application of payments to the discharge of certain notes held by Blanchard on said Gunn & Gates, but not given for the sum. Said payments having been made by Gunn & Gates to Blanchard before the assignment, specifically to apply on the sum, as shown by the proof. But as the same question will come up in discussing the instructions its consideration is deferred till then =

The 3^d & 4th assignments relate to the exclusion of McNeal a Witness produced by the defendants =

The objection to this Witness is his supposed interest in the event of the suit =

The Witness stated on voir dire that he did not think he had any interest. That when Gunn & Gates formed their partnership, they agreed to employ Witness as general agent & manager in place of Gates, who, it was then, was not a business man. That Gates owned $2\frac{2}{3}$ of the concern & was to have $\frac{2}{3}$ profits. That afterwards, without the knowledge or consent of Gunn, Gates & the father in law of Witness arranged that, in lieu of salary, ^{Gates} ~~Witness~~ should allow Witness to receive $\frac{1}{2}$ Gates share of the profits in compensation for services; and to equalize matters, it is provided, the father in law of Witness paid Gates as a further consideration for coming into this arrangement the father in law of Witness paid Gates \$200. & gave his note for \$30. more = The court deeming the Witness interested, on this statement, Defendants then produced a Release from the Witness to said Gunn & Gates to said Cooper & Pratt, as their assignees,

of all interest present & prospective in said copartnership, and all claim on either of the partners, on said ~~of~~ ^{of} signees for any interest in the effects of the firm, or in any surplus or profits which might remain for distribution to the partners after payment of debts. But still the writ was excluded on the score of interest. And in this we think the Court clearly Erred. Even if McNeal became a partner, so as to be liable to third persons for the debts of the concern, (which we think was not the case), it could not be for his interest to defeat this lien, the only effect of which would be to let him pay the debt in a suit against him as partner, with Gunn & Bates, personally.

The proceeding under this law is Exemplative and does not prevent another suit against the original debtors for the debt. It is also strictly in rem, and the judgment obtained only authorizes a sale of the property on which the lien attaches. — *Belahay vs. Clement*, 2 Scam. 531.

A judgment against the Petitioner thereon, or dismissal of the petition, which is the reverse thing, settles nothing as to the liability of the original debtors.

For a like reason the defeat of the lien attempted could in no way increase the fund out of which profits might be distributed to the Unitors. As the debt would still remain and would have to be satisfied before any profits could be divided.

But supposing this not to be so, the release certainly took away all interest, and that the Unitors should still have been deemed incompetent on this score, is inconceivable.

The 5th & 6th Assignments relate to instructions given on one side & refused on the other =

The 1st given for Petitioner instructs the jury substantially that ~~they~~ if the Petitioner furnished Gunn & Gates Materials as charged in the petition, & under a contract with them, they should find for him, against all the dependants the value of all the materials furnished less any payments proved by the dependants =

This instruction is wrong - 1st, in not requiring proof that the lumber was furnished under the contract set out in the petition - the language is "under a contract with Gunn & Gates" - and 2nd, in not requiring any proof that the lumber furnished was used in the construction or repair of ~~the~~ Build up, upon the lots in question = It is not enough that the lumber may have been furnished, and that it may have been obtained under a contract specifically for that purpose, if it was not actually so used, it could not justify a verdict for the Petitioner in this proceeding, nor any part of the premises claimed in the petition =
See on this Gatzert vs. Case, 15 Ill. 192, where the point is settled =

By the 2nd instruction the jury are authorized to allow interest on the amount found due, if they also ~~find~~ ^{find} that Gunn & Gates have unreasonably & vexatiously delayed payment =

To this it is objected that the default of Gunn & Gates ought ^{not} to prejudice Hunter, the owner of the premises, nor the creditors under the assignment; yet such is the clear tendency of the instruction,

as given = It is also submitted that the statute giving interest upon an open account, for delay, is in ~~the~~ ^{its} nature ^{of a} penalty, and will not be enforced except against the party actually in default = But in the case under consideration the burden falls on others =

The 3rd instruction is liable to the objections taken to the 1st = It does not require ^{that the lumber} should have been furnished under the contract set out, or any contract, nor that any portion of the lumber should have been used in the buildings in question = What is said moreover about adjusting conflicting accounts between Gunn & Gates & Petitioner might tend to confuse & mislead the jury =

The 4th instruction is wholly inapplicable to the case, and only calculated to mislead the jury = The evidence shows that there were no accounts to be settled between Blanchard & Gunn & Gates =

Blanchard held their notes for a matter wholly disconnected with the lumber, and they had made to him sundry payments, specially to apply on the lumber, the amount of which payments as ~~of~~ also of the Bill of Lumber had all been determined. Now the question was whether Shilly should be allowed to change the relations existing between & settled by these parties for themselves, by changing the application of payments, already fixed by the parties themselves, from the lumber to the notes, not whether unsettled accounts were to be balanced, and the ^{unappropriated} surplus due from Blanchard to Gunn & Gates, carried to the notes as is assumed in the instruction given =

The instruction is further inapplicable in that there is no evidence tending to show that Philley was the agent or clerk of Gunn & Gates, or had any such authority as indicated in the instruction. The testimony is that "it was agreed" between Philley, as assignee, and the Petitioner that the "\$216. and the amount of the ^{freight} bill should be applied on certain "notes" &c. Nothing said anywhere about Philley acting in any other capacity than as assignee. The Witness (Folliott) also says - "Petitioner knew of the assignment at the time of the endorsement on the notes".

It is further manifest that the consent of Gunn & Gates was not obtained to the application of these payments on the notes - the evidence being that, at the time, Gunn & Gates claimed that the consideration of the notes had failed - page 29, at bottom =

The 5th instruction is liable in part to similar objections - it assumes further that said \$300. note was in possession of the dependants - in the plural - for over a year, or leaves it to the jury to find, if this were so, that the parties ⁱⁿ interest approved of the arrangement.

On referring to this instruction it will be seen that a delivery ^{of the note} to Philley is first set out. then its possession by the dependants, and lastly an approval of the arrangement by the parties in interest, in which latter category of Creditors under the assignment next parties to the suit, may be said to be included. - Not to dwell upon these charges, so well calculated to confuse & mislead - it is sufficient to say that there is not a scintilla of proof that any of the dependants, except Philley, ever knew of the arrangement referred to, or ever saw the note after it was first given; And Even as to Philley, the inference from the Record is

that, Tho' delivered to him at the time, that delivery was rather no form than real, as the note somehow or other got back into the possession of Blanchard and was by him first produced in evidence = Add to this that the record shows Shilley left the state shortly after the so called arrangement was made & has not since been back, and the possession of the note by Blanchard certainly needs explanation =

An instruction therefore that the jury might infer an approval of the arrangement, based upon a supposed possession of the note for over a year by the defendants, ~~when under~~ the circumstances above detailed, was inapplicable & erroneous =

The 6th instruction, which assumes that Shilley, as assignee, might set off the \$300. note held by Blanchard on Gunn & Gates, against indebtedness due from Blanchard to said firm, is objected to, among other things, for the reason that it virtually enables the assignee to make preferences among creditors not contemplated by the deed under which he acts = And this, it is contended, he had no right to do = Blanchard not being precluded by the assignment, is thus enabled by the act of the assignee to come to override that instrument and get payment in full on his demand, when, in a case of insolvency like the present, he could not perhaps get 50 percent in the ordinary way = The other creditors of Gunn & Gates are thus wronged, and have a right to insist that the assignee, like an administrator shall collect rationally all the debts due the concern, and pay out pro rata upon all the demands of equal degree under the assignment =

There is also some ^{language employed} ~~confusion~~ in the latter part of the instruction about allowing

no party to the suit, and as to him therefore there was no suit pending till that date.

Persons not parties to the proceeding will not be affected by it: 17 Ill. 300. 11 Ill. 519.

A creditor claiming under this law who does not file his Bill till after six months from the time payment is due by the contract loses his lien as against creditors or encumbrances, whether they are creditors &c. ~~at~~ before or after the making of the contract: 3 Gilman. 511 =

There can be no doubt but that a purchaser in good faith is also aided by the limitation of the Statute, and such Hunter is deemed to be =

The 6th instruction is that the answer, so far as responsive to the petition is evidence, and unless disproved by ~~testimony~~ ^{evidence} stronger than the testimony of one witness should be regarded by the jury otherwise.

By several decisions of this Court this is declared to be a Chancery proceeding. And in *Garrett vs. Stevenson* 3 G. 261 the point is expressly decided =

If it be replied that the answer in this case is not sworn to, the rejoinder to this is, that it was accepted in this way, and as the Statute governing this proceeding does not authorize the oath to be waived, it is to be deemed as having the same efficacy as if sworn to =

Blanchard credit for the Note and for the Endorsements, the purport of which is not well understood and which is calculated to mislead =

The 1st, 2nd, 6th & 7th instructions asked by dependant to be given were refused by the Court & Exception taken =

The substance of instruction No. 1, is, that to entitle the Petitioner to recover he must ^{not only} prove that he sold the Lumber for the purpose of being used in erecting the buildings described in the Petition ^{but} and that it was so applied. And if ~~the~~ only a part of the Lumber sold went into the buildings the Jury should find only for the amount proved to have been so used =

If the views heretofore expressed are correct, this instruction was right & should have been given =

Instruction No. 2, is. That if all the Lumber was delivered more than six Months prior to the 2nd day of May 1855, and was to be paid for on delivery, and if the Jury further believe that the dependant, Hunter, purchased the property in the petition mentioned prior to the commencement of the suit and without knowledge of Petitioner's claim, they should find for dependant =

This we also think is law and should have been given = Till the filing of the amended & supplemental petition, on the 2nd May 1855, Hunter was

The 7th instruction asked by dependants, and which was
refused by the Court is this - "That" Plidley, as as -
"assignee, had no authority to change the application
"of payments made before his appointment as as -
"assignee, and any act of that kind was beyond his
"authority & void."

This proposition seems to us to plain
as to make it unnecessary to dwell at length upon it.
The duties of an assignee are prescribed by the terms of the
Trust confided to him - These are, to receive the prop-
erty committed to his charge, as it is, dispose of
it, and pay over the proceeds - Whatever power he
might have, under some circumstances, to com-
pound debts, certainly cannot be construed into a
license to go behind the power that created him & undo
its work - ~~This is no part of the business he was commis-~~
~~sioned to do - to alter -~~ In this case Gunn & Gate are sup-
posed to have made the payments in question specifi-
cally upon the Sums - They place their property in
the hands of Plidley for the benefit of their Cred-
itors, and he assumes to overrule the work and apply
these payments on demands against Gunn & Gate,
which they insist are unjust - To state the propo-
sition, it would seem, should condemn it - To permit
an assignee thus ^{to} collude with pretended ^{claimants} would be
of most dangerous tendency, and destructive of
the real interests committed to his hands -
The instruction should have been given -

The 7th & 8th Assignments of Error are that the Verdict was against the Law & the Evidence =

If the positions assumed here to prove are correct then these Errors are well assigned = Not to speak of other things, the Evidence failed entirely to show how much of the Lumber sued for was used in the construction of the Buildings in question, and there was no attempt made to discriminate, and show how much was used in each = Indeed, it is difficult to see how, under the averments in the petition, ^{on} ~~for~~ this head, how a verdict could be rendered at all = It is evident also, that the jury allowed interest on the account, the \$400. advanced being deducted from the original account =

On the 8th Assignment of Error we have simply to remark that there was no verdict on which a judgment or decree could be rendered upon the pleadings in the case = The allegation in the petition is that the Lumber was furnished & used in constructing two separate & distinct buildings - one on Lot 8 in Block 1, and the other on Lot 2 in Block 46 in the Town of Chillicothe = The verdict is for an aggregate sum for the Lumber used in both =

For many of the reasons given the decree rendered
was erroneous: It authorizes the sale of both
the lots described in the petition for the agree-
gate sum found due to the Petitioner: It declares
the sum so found due a valid lien on both lots
without finding that any of the sum was used in
building on or improving them, and without re-
gard to the rights of Hunter, ^{as pendg ver,} or the other appellants
as trustees for the creditors of Gunn & Gates.
and it adjudges costs against all the defend-
ants: If the views herebefore presented are cor-
rect, no such decree, nor indeed any decree,
could be rendered in the case:

Cooper, Purcell & Pratt
for appellants.

Hunter & Co.

vs. =

Blanchard

Appellants' Brief

Filed April 28. 1857

L. Leland

Clerk

To the Hon. Ouslow Peters, judge of the sixteenth
judicial circuit of the state of Illinois.

Your petitioner Joseph
Blanchard of the county of Peoria and
State of Illinois represents unto your
Honor

That on
or about the first day of July A.D.
1854, Frederick R. Gunn and Samuel Gates were pro-
secuting business under the name and firm of
'Gunn & Gates' in the town of Chillicothe in ~~the~~ said
County of Peoria and that said Gunn & Gates at
the time aforesaid owned and possessed or were
the reputed owners of lots number eight (No. 8) in
block Number one (No. 1) and lot number two
(No. 2) in block forty-six (46), situate in said town
of Chillicothe, Peoria County and State aforesaid.
That said Gunn & Gates, ^{on or about the said first day of July A.D. 1854} entered into a contract
with your petitioner who was then and these
a lumber merchant to furnish lumber for
two buildings which said Gunn & Gates were
then about to erect upon said two lots. One
of said buildings to be a frame ware house
one story high, sixty feet long and thirty
feet wide, said ware house to be built
upon said lot number two and used for
storing grain &c.

The other of said buildings to be a frame
store house two stories high, thirty feet

long and twenty-feet wide to be built upon said lot number eight and used for retailing goods, merchandise &c.

That said Blanchard agreed to furnish all lumber, studding, joists, planks, boards, lath &c. necessary for the construction of said buildings and at such times during the progress of said constructions as said Gunn & Gates should direct and order, and that said Gunn & Gates promised to pay to the said Blanchard for said lumber &c. used in the construction of said buildings the sum of nine hundred and sixty four dollars and fifty one cents.

Your petitioner further shows that under and in pursuance of said contract he the said Blanchard did furnish all the lumber, joists, studding, plank, boards, lath &c. (more particularly set forth in a bill of particulars hereto attached and marked 'A') used in the construction of said buildings and at the times required in said contract and the lumber &c. so furnished by your petitioner amounted in value to the said sum of nine hundred and sixty-four ⁵⁷/₁₀₀ dollars. And your petitioner further shows that said Gunn & Gates prosecuted and continued the construction of said two buildings at the same time and your petitioner had

what the same would be reasonable worth
and your petitioner shows that said lumber (a
Bill of which with the quantities kinds & prices is hereto at-
tached and made part of this petition) was reasonable worth
#

no information or knowledge as to the ^{precise} quantity kind or value of the lumber used in either of the buildings but the same was used in both buildings & in manner & form as desired by Gurn & Gates

Your petitioner further represents that said lumber &c was furnished on and between the thirteenth day of July AD 1854 and the fourth day of December AD 1854 and at the time last aforesaid the said Gurn & Gates promised to pay your petitioner the said sum of money then due him, yet the said Gurn & Gates have not paid said sum of money nor any part thereof for which said sum your petitioner ought to have a lien upon said two buildings and the said two lots.

Your petitioner further represents to your honor that on or about the said fourth day of December AD 1854 the said Gurn & Gates became embarrassed and insolvent & on or about that day assigned all their property and conveyed said premises and buildings to one Sylvester C. Filley who took and accepted said conveyance subject to the demand and claim of your petitioner. ~~###~~

Your petitioner further states that said Sylvester C. Filley took actual and exclusive possession of said buildings and said two

Your petitioner further states that Allen Hunter, Jonathan C. Cooper & Horn & Pratt claim some interest in said premises but they and each of them took said interest subsequent to the furnishing said materials by petitioner & subject to the lien of petitioner on same for his said material &c.

lots on or about said forth day of Decem-
ber AD 1854 and from thence hitherto has
remained & still is in the exclusive posses-
sion thereof, but took the same with full
knowledge of ptffs claims. He further
states that there have been no payments
made for said lumber and that the whole
amount thereof is due and owing to your
petitioner.

Your petitioner further shows that
the time of furnishing said lumber nor
said contract extended to a longer period
than three years nor the time of payment
beyond the period of one year from the
time all of said lumber should be de-
livered.

Your petitioner therefore prays the
aid of the court in this behalf that the
said Frederick R. Gunn, Samuel Gates,
^{Allen Houghton, Jonathan W. Cooper & Loren G. Pratt,}
and Sylvester C. Filley, be made parties
dependants to this petition. That they and each
of them be duly summoned in this cause
That they and each of them answer all
and singular the several matters & things
hereinbefore set forth but without
oath, their oaths being expressly waived
That upon the final hearing of this cause
an account may be taken of the amount
due to your petitioner for this lumber &c

so furnished. That he may have and
obtain a decree and order of Your Honor
perfecting his lien on said premises for
the amount found to be his due and
that said defendants Gunn & Gates or Filling
or some of them be decreed to pay said
sum of money within such short day to
be fixed by the court and that in default
of such payment said premises may be
sold under the order of the court and that
the respective rights & liens of the parties
be adjusted and settled by the court and that
your petitioner may have such other and
further relief as equity and good con-
science may require.

Grove & Mc Coy

Sols for Petitioner

State of Illinois }
Peoria County } ss

J. Enock Sloan, clerk
of the circuit Court in and for said
county and state, do certify that
the foregoing "petition for mechanics

lien" in the cause wherein Joseph Blau-
chard is plaintiff & Sumner & Gates are
defendants, is a full and correct copy of
the original as the same remains on file
in my office. The interliniations on the mar-
gin and between the lines are the same as
in said original copy, and are copied as ac-
curately and as much like the said orig-
inal, as my skill and ability would per-
mit.

In testimony whereof I hereto at-
tach my hand and affix the seal
of said Court, at Peoria, this 27th
day of April AD 1857.

Ernest Sloan

126.

Hunter
r

Blanchard

ALLEN HUNTER, et als.
Appellants, vs. } In the Supreme Court.
JOSEPH BLANCHARD, Appellee.

DEFENDANT'S BRIEF.

Blanchard filed his petition in the Peoria County Circuit Court against Gun and others, for a mechanic's lien.

The original petition is not correctly set out in the record. The original petition was in words and figures as set out in the certified copy hereto attached. The only difference between the copy of the petition as set out in the record and in the copy annexed and certified to, consists in the fact that the entries on the margin are not inserted in the proper place in the record. But it is claimed by the appellee that sufficient appears upon the record to sustain the petition after verdict.

1. The record shows that the materials were furnished between July 13, 1854, and Dec. 4, 1854. See bill of particulars, and evidence of Folliot.
2. The original petition was filed March 23, 1855.
3. The amended bill was filed May 2, 1855.
4. The answers of Gunn, Gates, Filley, Hunter, Cooper and Pratt, filed May 13, 1856, WITHOUT OATH.

The time the materials were furnished and the time of the filing the original and amended petitions is shown, because the appellants seem to insist that Hunter did not purchase or take subject to the lien for the lumber. Upon that point see Sec. 24, Revised Stat., chapter leins, page 348.

The answers of the defendants were filed within the six months.

5. It appears that Blanchard held several notes against Gunn & Gates, and that the latter made some payments, and freighted some lumber which was applied on the notes. The appellants now insist that these payments should have been applied on the lumber, and they insist that Filley had no right to make the application as made.

To this we answer:

1. That Filley had as much authority to make the application as the defendants now have to repudiate the application made.
2. Can Filley repudiate now what he done in good faith two years ago.
3. At the time the application was made, one of the notes was delivered up to Filley, and remained in the possession of the defendants until the trial, and was by them offered in evidence. The appellee insisted that the defendants have ratified the appropriation by accepting and retaining the note.
- 5: It was impossible for Blanchard to maintain any suit on the note while in the possession of the defendants, and until they repudiated the application made by Filley, the endorsements made on the notes retained by Blanchard would be a bar to a recovery to the amount of such indorsements.
6. M'Neil was not a competent witness. He acted as agent; managed the business, and was to have one third of the profits. This made him a partner and liable for the debts of the concern. If he could testify to a state of facts that would defeat Blanchard in the trial then pending. Blanchard could not maintain any other suit for the same cause of action. 17 Ill. 565, English Common law reports, 268. Collyer on Partnership, 6, 717, 718, 919, and 720.
7. The witness was liable to Gunn & Gates, or to Gates for his share of the losses of the firm, or of Gates in case it turns out that the firm sustained losses.
8. The witness would also be liable to Blanchard, in case he sued the three.
9. Before the witness could be competent he should be released by Gunn, by Gates, and also by the petitioners.
10. It is submitted that the decree should not be reversed for the further reason that it does not appear that the evidence of the witness would have been material.
11. There is evidence tending to prove the case made in the petition, and the whole question was submitted to the jury.
12. The question of interest was submitted to the jury in the words of the statute:
13. The question of the ratification of settlement between Blanchard & Filley, was submitted to the jury under proper instructions, and found for the appellee.
15. The construction of the appellant was properly refused because the petition, answers and the answers were not under oath.

GROVE & McCOY.