

13018

No. _____

Supreme Court of Illinois

Brauhn

vs.

Nibbe

118
STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division

No. 115.

Branch
vs.
Nible

13018

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the third Monday, (being the third day) of June in the year of our Lord one thousand eight hundred and eighty nine and of the Independence of the said United States the eighty third

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois. }

Charles Warren States Attorney.

John Gray Sheriff of Cook County.

Attest, William B Church Clerk.

Be it remembered, that heretofore, to-wit: On the 21st day of June. AD 1858 there was issued out of the Office of the Clerk of the Court and under the seal thereof the People certain writ of Summons, directed to the Sheriff of said County to Execute, and clothed in the words and figures following to-wit:

" State of Illinois } ss
County of Cook }

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

We command you that you summon Henry Dickson if he shall be found in your County, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago, in said County, on the 14th Monday of June inst, to answer unto

Frederick Brauhn, who sues for the use of Frederick Stolt in his petition for a mechanics lien.

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

Seal

Witness William L Church, clerk of our said court, and the seal thereof, at Chicago aforesaid this 5th day of June A D 1858.

Wm L Church
clerk

And of records, to-wit: on the day and year last aforesaid there was filed in the court aforesaid, a certain petition for Mechanics Lien, which is in the words and figures following to-wit:

"State of Illinois } ss
Cook County }

In the Circuit Court of Cook County
June Special Term A D 1858

To the Hon George Manarin, Judge of the Circuit Court of Cook County

Humly Complaining sheweth unto you Honor, your Petitioner Frederick Brauhn of Dubuque, State of Iowa, who sues for the use and benefit of Frederick Stolt of Cook County aforesaid, that on or about the eighteenth day of March A D 1857, one Henry Stolt of Cook

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County of Nevada, was the owner in fee of Lot Seventy-six
in Block Twenty-six in the General Trust Subdivision of
the north half (Except the north ^{of the south east quarter} east quarter, and
the south east quarter of the north west quarter of
Section four in Township thirty-nine Range fourteen
East of the third P. M., in the County of Clark
of Nevada -

That on or about the day above
mentioned, your petitioner and said Hight did enter into
a certain contract or agreement in writing bearing date
said day, (a copy whereof is hereto annexed, marked
Schedule A and made part and parcel of this
petition) in and by which it was agreed on the part of
your petitioner that your petitioner would build for said
Hight, a certain house described in certain specifications
referred to in said contract, and have the same fin-
ished and completed on or before the first day of June
A.D. 1857, in accordance with the said specifications
and the plan adapted by said Hight for the structure
of said house;

In consideration whereof said Hight
promised to pay your petitioner, for the building and erection
of said house the sum of nineteen hundred and thirty-five
dollars, in manner following, viz: Two hundred dollars
as soon as your petitioner should have brought the
bricks for the foundation and the timber for the house
upon the lot whereon said house was to be erected
(being the same lot and premises above described);

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Four hundred dollars, when the roof should have then
put on said house and be completed; six hundred
dollars on the first day of September AD 1857, and
the balance of seven hundred and thirty five dollars
on the first day of June AD 1858, with interest at
the rate of ten per cent per annum since 1st June AD
1858, all of which will fully and at large appear
by reference had to said Contract.

And your Petitioner further shews
unto your ^{Honor} that the said house referred to in said Contract
was to be build and Erected upon the premises above
described,

And your Petitioner further shews
unto your Honor that on or about said 18 March AD
1857 your petitioner did in accordance with the pro-
visions of said Contract, Enter upon the erection of said
house upon the above described Real Estate and
premises, and commenced laying the foundation of
the same, and that while thus progressing with the
laying of said foundation and the completion of the
work in said Contract described, the said Stickler
came to your petitioner, and stated to him that he
wanted to have certain alterations made in the structure
of said house materially different from the specifications
or plans above referred to and that he wished to have
the size of said house increased.

And your petitioner further
shews unto your Honor, that he did then and there

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agree to finish and construct a house upon said premises in accordance with the wishes of said Hibbs, and to make it so far different from the original plan, as was then by said Hibbs desired. In consideration whereof said Hibbs did then & there agree to pay unto your petitioner, One hundred dollars over and above the price mentioned in said contract payable upon the completion of said house and the acceptance thereof by said Hibbs.

And your Petitioner further shews unto your Honor, that at the time of the above mentioned alteration of the original contract, nothing was said about the time in which the said house was to be finished nor was any thing said about any alteration of the terms of payment, but said Hibbs was to pay your petitioner One hundred dollars additional on the completion of the work.

And your petitioner further shews unto your Honor, that he did thereupon Erect, construct & build upon the lot and real estate above described, a house in all respects in conformity with the wishes and requirements of said Hibbs on the premises, and under the immediate direction of said Hibbs.

And that on or about the 10th day of September A D 1857 your petitioner had the said house fully completed and finished and made delivery thereof to said Hibbs, who then and

there accepted the same and declared himself in all respects, and fully satisfied with the same.

And your petitioner further shews unto your Honor, that he has received of said Hibbs on account of the said contract, the sum of Twelve hundred dollars and no more, and that there is still remaining unpaid to your Orator from said Hibbs on account of said work done under said contract, the full sum of Eight hundred and thirty-five dollars with interest according to the aforesaid agreement to which there are no credits, discounts, and offsets on the part of said Hibbs, and which is ~~now~~ fully due and payable.

The prayer of your petitioner in the premises therefore is, that the said Hibbs may be summoned to appear before your Honor, and answer all and singular the premises as by law prescribed (without oath however, an answer under oath being hereby expressly waived), and that it may be ascertained in the manner prescribed by ~~the~~ statute in such case made and provided, how much there is still due to your petitioner from said Hibbs on account of said work, and that your petitioner may have judgment for the amount so found to be due to your petitioner against said Hibbs, and that such judgment may be declared a lien upon the Real Estate and lands above described, and that the said Real Estate or such part thereof as may be sufficient

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for the purpose may be sold for the satisfaction of said judgment, and that your petitioner may have such other and further relief in the premises, as to your Honor may seem proper and meet; and the nature of this case may require,

May it please your Honor to grant to your petitioner the writ of habeas corpus of the People of the State of Illinois, to be directed to said Henry Weber thereby commanding him personally to appear before your Honor at the next term of this Honorable Court, then and there to answer all and singular the premises, and to stand to and abide the order and decree of this Hon. Court in the premises
Chicago. 5th June AD 1858.

David Rossin
Plt & Solr

Frederick Braun
by David Rossin. his Atty

"Schedule A"
referred to in the annexed petition.

"Brown, mason agrees with Henry Weber, both of Chicago Illinois, to build for him the House described in the foregoing specifications and to have the same finished and completed on or before the first day of June 1857, for the sum of Nineteen hundred and thirty five dollars \$ 1935. And said Henry Weber agrees to pay to said Braun, provided that he have

built by said Braun shall be found in every particular and in general in accordance with said specifications and plans adopted by said Shiber for the structure of such house; the sum of sixteen hundred and thirty five dollars, \$1935. in the following manner, to-wit: Two hundred dollars, \$200, as soon as said Braun shall have brought the Bricks for the foundation and the timber for the house into the lot whereon the house is to be erected; four hundred dollars \$400 when the roof is put on the house and completed; six hundred dollars, (provided the house is built in accordance with the specifications and finished and delivered as above mentioned, on or before the first day of June 1857) \$600, on the first day of September 1857, and the balance of seven hundred and thirty five \$735. dollars the first day of June 1858 with interest at ten per cent per annum since June 1st 1857.

In witness whereof
 the parties in the presents have hereunto set their hands
 this Eighteenth day of March. AD 1857
 signed in presence of } Henry Shiber "
 " Frie Braun "
 " F Herbing "

Copy of account mentioned in the Answered petition

Henry Habbe vs. Frederick Brahm Or

To Building house as per Contract	\$ 1935.00
" Compensation for Extra work done in said house at my request & direction as per agreement	100.00
	2035.00
For By payments made	1200.00
Balance due	835.00

And afterwards, to-wit: on the
29th day of June A D 1858, said writ was re-
turned into the Court aforesaid by said Sheriff
Endorsed as follows, to-wit:

"Served by reading to the within
named Henry Habbe and delivering him a copy
of this writ. the 5th day of June 1858, fees -
1 Service 50, 1 copy 50, 3 mile 15, 1 Return 125
Paid by plff & atty, John E Nelson Sheriff
by Ira Brown. Wap

And afterwards, to-wit: on the
Eight day of July in the year last aforesaid said
defendant Habbe by Thompson & Dapfull his
Attorneys, filed his certain answer, which is in the words

and figures following, to-wit:

Book County Circuit Court
of the June Term 1858

Henry Schick
ad

Frederick Brauhn
who sues for the use of
Frederick Schick

The Answer of Henry Schick
defendants to the petition of Frederick Brauhn who sues re
Petitioner,

State of Illinois vs
Book County

This defendant, now and at all times
hereafter, saving and reserving unto himself, all manner
of benefit and advantage of Exception, to the many errors
and insufficiencies in the said petition; for answer to
said petition, he ^{answers} says, as follows, that he to say,

That this defendant admits that
he was the owner in fee of said lot 96 on the 18th day of
March 1857 as is in said petition in that behalf
alleged, and that this defendant also admits, that on
or about the said 18th day of March, he entered into the
agreement in said petition first stated and set forth,
together with the said Frederick Brauhn, and in the
manner as is in said petition in that behalf alleged

And this defendant for further
answer to said petition, says that he admits the making

of the agreement in said petition secondly stated and set forth, in and by which agreement it was agreed by and between said Brauhn and this defendant to make the said house so far different from the original plan as was desired by this defendant, as is alleged in that behalf in the said petition, and that this defendant should pay therefor, the sum of One hundred dollars over and above the price mentioned in the Contract in said petition first mentioned and set forth,

And this defendant further answering admits, that nothing was said at the time of the making said agreement secondly above mentioned, as to when said house should be finished, but this defendant avers, that it was understood by and between the said Brauhn and this defendant, that said house should be finished at the time agreed upon in the Contract first above mentioned.

And this defendant further answering denies, that the said Brauhn did thereupon, or at any time since the making of said contract, nor has he now, Erected, constructed or built upon the lot or Real Estate ^{in said petition} described a house at all in conformity with the wishes or requirements of said defendant, or in accordance with the plans, specifications, or Contract or contracts in the premises.

And this defendant denies, that on or about the first day of September A D 1857 or at any other time, the said petitioner had the said house

Completed or finished or made delivery thereof to this defendant or any person in this defendant's behalf, or that this defendant ever accepted the same or declared himself in any respect satisfied ^{with the same} except as is herein after stated.

And this defendant further saith he did pay to the said petitioner on account of said work or contract the sum of Three hundred and Eleven dollars and ten cents, but he denies that the sum of Eight hundred and thirty-five dollars with interest or any ~~the~~ sum whatever remains due or payable to said Brauhn from this defendant to said petitioner on account of said house or said agreement or either of them, or that there are no credits, discounts or offsets to the same on this defendant's part.

And this defendant further answering saith that the said Brauhn has failed to do and perform the agreements aforesaid, that the work and materials done and furnished by said Brauhn under said contract or contracts were of a very poor & inferior description and almost worthless, that a large number of the items and specifications in said contract contained were entirely omitted by said petitioner, and that the whole or at least the largest part of said house has been erected by said Brauhn in a coarse, careless, negligent and unskillful manner, and that said house is not in accordance with the said

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agreements or either of them.

And this defendant further says that the said Brauhn left this state some time in the month of September last past, and before the finishing or completing defendants said house, leaving no property in this state, and this defendant having no remedy for his damages against said Brauhn, and no remedy to compel the said Brauhn to perform the said contract on his part had to and did necessarily incur great expense in and about the finishing and repairing said house where the same had been left unfinished or injured by the negligence of said Brauhn.

And this defendant further answers says, that said Brauhn took possession of said house, and held possession of the same, after he had so partly finished the same in the manner last aforesaid, refusing to either complete the same or permit this defendant to obtain possession of said house for about one month after the same should have been finished, as was in and by said contract agreed, nor could this defendant obtain possession of said house until about the time when said Brauhn departed from this state as aforesaid.

And this defendant further says, he has been damaged one thousand dollars by reason of the negligence of said Brauhn, and by reason of the refusal of said Brauhn to finish

said house

And this defendant prays that
the said petition may be dismissed, and for such
further and other relief or judgment as may be just
and Equitable.

Thompson & DePaul
Attys for deft

Henry Hobbs

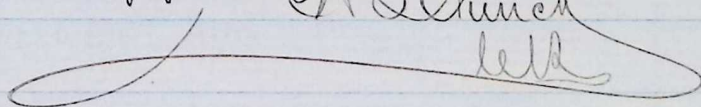
State of Illinois }
Cook County } ss

Henry Hobbs being duly sworn doth
depose and say, he is the defendant in the foregoing
answer named, that he has read said answer and
knows the contents thereof, and that the same is true
of his own knowledge. Except as to the ^{which are} matters therein
stated upon deponents information and belief and
as to those matters he believes it to be true.

Subscribed & sworn to before me

this 8th day of July AD 1858

Mrs Church



Henry Hobbs

And afterwards to-wit: on the 8th
day of July in the year last aforesaid said plaintiff
by Davis and Train his Attorneys filed in the Court
aforesaid his certain Replication, which is in the words
and figures following to-wit:

State of Illinois
Cook County

In the Circuit Court of Cook County
June Special Term AD 1858

Frederick Brahm who sues
for the use of Frederick Stahl

Henry Stahl

The Replication of
Frederick Brahm, who sues for the use of Frederick Stahl
to the answer of Henry Stahl defendant.

This replicant having and
reserving unto himself, all and all manner of advantage of
Exception to the manifold inefficiencies of the said answer,
for replication therunto says that he will avow and prove
his said Bill to be true, certain and sufficient in law to
be answered unto, and that the said answer of the said
defendant is uncertain, untrue and insufficient to be re-
plied unto by this replicant; With this that any
matter or thing whatsoever in the law to be replied unto,
confessed or avowed, traversed or denied is true; all
which matters and things this replicant is, and will be
ready to avow and prove, as his Honorable Court shall
direct, and humbly prays as in and by his said bill
he hath already prayed.

David & Susan
Wright

And afterwards, to-wit: at the April term of said Court, to-wit: on the 1st day of May in the Year of Our Lord, Eighteen hundred and fifty nine the following, among other proceedings, were had and Entered of Record, to-wit:

"Frederick Brauhm for
the use of Frederick Stoll-

13754

Young Stiller

Petition for Mechanics Lien

This day comes the said plaintiff by Nicholas and M^cKindley his Attorneys, and the said Defendant by Francis W. P. Fuhl his Attorney, also comes and issue being joined herein, it is ordered that a jury come, Whereupon come the jurors of a jury of good and lawful men to-wit:

A. Blenkins	E. Butterworth	W. A. McPherson
James Walker	P. C. McDaniel	G. S. Butler
E. O. Freeman	R. S. Chapman	E. Nail
L. Young	W. Parks	S. S. Rider

Who being each duly elected tried and sworn, well and truly to try the issue joined herein aforesaid, and a true verdict render according to law and the evidence, and after hearing a part of the Evidence, the hour of adjournment having arrived it is ordered that said jury have leave to separate to meet the Court at the coming in thereof, Monday morning nine O'clock

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And afterwards, to-wit: at the
same term of said Court, to-wit: on the 9th day of May
in the year last aforesaid, the following proceedings,
among others, were had and Entered of Record, to-wit:
"Frederick Braum for
the use of Frederick Blatt

13454

Henry Schick

Petition for Mechanics Lien

This day again comes as well
the said plaintiff by Charles McIndley his Attorney
as the said defendant by Francis DeFuhl his attorney,
and the jurors of the jury aforesaid also come, and
the testimony in this cause having been closed, and the
said jury having heard arguments of counsel as well
on the part of the said plaintiff as of the said defendant
and the instructions from the Court, retire to consider
their verdict under the charge of a room officer of
the Court, and afterwards come into Court and say:
"The jury find the issue for the plaintiff, and
assess his damages to the sum of Eight hundred and
Ninety Eight dollars"

Whereupon the said defendants
counsel moves the Court for a new trial of this cause,

And afterwards, to-wit: at the
May term of said Court, to-wit: on the 3^d day of
June in the year last aforesaid, the following proceedings
among others, were had and Entered of Record, to-wit:

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13454
Frederick Brauhn who sues
for the use of Frederick Stoll

Henry Stoll

= Perfor Mechs Ein

This day again comes as
well the said plaintiff by Nicholas & McKindley his
attorneys as the said defendant by Francis W. Pfuhl
his attorneys, and the Court having heard arguments
of counsel on the motion of the said defendant heretofore
submitted to the Court for a new trial of said cause,
as well in support thereof as in opposition thereto, and
not being fully advised in the premises, takes said
motion under advisement.

And afterwards to-wit: at the
June Term of said Court to-wit: on the 20th day of June
in the year last aforesaid, the following proceedings,
among others, were had and entered of record to-wit:
"Frederick Brauhn for the
use of Frederick Stoll -

13454
Henry Stoll

= Mechanis Ein

This cause having been on
the 9th day of May A.D. 1859 brought on to be heard
upon the petition answer and replication filed in said
cause, and the issues in said cause made by said pleadings
and between said parties, having been settled by said
parties under the direction of the Court, and a jury

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 Having been duly selected Empanelled and sworn to try
 said cause, and said issues in said cause, both of the
 aforesaid parties being present, and attended by their re-
 spective counsels, at and during the trial of said cause
 and after hearing all the witnesses on the part of said
 petitioner in said cause, and all the witnesses on the part
 of the said defendant, and the said Court having read
 to the jury the instructions presented to said Court by both
 of said parties, as to the law of said cause, said jury
 duly retired, and after duly deliberating on their verdict
 and agreeing on the same, did duly report and find a
 verdict in favor of said petitioner upon said issues, and
 assessed the amount due to said petitioner, at the sum of
 Eight hundred and twenty-eight dollars, and did duly
 report the same to said Court; Whereupon the said
 defendant did by his Attorney, Enter a motion for a new
 trial in said cause; which said motion was argued
 by the respective counsels for said parties before said
 Court on the fourth day of June A D 1859 while the May
 Term of said Court was ~~yet~~ in continuance, which
 said motion was then taken under advisement; And
 now come again the said parties on the ^{the} 20th day of
 June A D 1859 being the first day of the June Term of
 said Court for said year, and the Court being now
 fully advised as to said motion for a new trial, doth
 order that the same be denied, on condition that the
 said petitioner take judgment for the sum of seven
 hundred and twenty-five dollars in the place of

And ~~to~~ the buildings thereon described in the petition
 in this cause, be sold by the Master in Chancery
 of Cook County after first giving twenty days no-
 tice in some daily newspaper published in Chicago,
 which notice shall be published at least ten days
 during said time, to make the amount of the aforesaid
 judgment of seven hundred and twenty-five dollars
 and costs of this suit, and also the costs of said sale,
 said premises described in said petition in this cause
 and hereby decreed to be sold being but seventy
 six (76) in the legal tracts subdivision of the north
 half (Except the north east quarter of the south
 west quarter and the south east quarter of the
 north west quarter of Section four (5) in Township
 twenty nine (29) North of Range fourteen (14) East
 of the third principal meridian in the City of Chicago
 County of Cook and State of Illinois, and that said
 master execute a deed to the purchaser and report
 his doings as soon as practicable; And it is further
 ordered adjudged and decreed that of the money arri-
 ving from the aforesaid sale be not sufficient to
 pay the amount of the aforesaid judgment, costs of
 suit and costs of said sale and the interest on said
 sum of seven hundred and twenty-five dollars from
 the date of this decree, which said interest is hereby
 decreed to be collected out of said property and paid
 to said petitioner, that the said petitioner have an ex-
 ecution issued in this Court against the property and

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Effects of the said defendant upon such decree and
that the amount so made be endorsed and credited
on said judgment and execution; Whereupon ^{the} said
defendant by his Counsel excepts and prays an
appeal from said judgment, to the Supreme Court
of the State of Illinois

And afterwards, to-wit: on the
28th day of June in the year last aforesaid, there was
filed in the Court aforesaid, a certain Appeal Bond
which is in the words and figures following to-wit:

Now all men by these presents -
that we Henry Shiba and Michael Mc Caffrey
both of the City of Chicago Cook County Illinois, are
held and firmly bound unto Frederick Brauhn his
heirs Executors administrators and assigns in the
penal sum of fifteen hundred dollars lawful money of
the U.S. for the payment of which sum of money, well
and truly, to be made unto the said Brauhn his
heirs, Executors administrators and assigns, we bind
ourselves, our heirs, Executors and administrators, severally
and jointly, firmly by these presents; Sealed with our seals
dated this - day of June A.D. 1859. Whereas the
said Frederick Brauhn for the use of Frederick Blott
at the May Term 1859 of the Circuit Court of said Cook County
recovered judgment against the above bounden Henry Shiba
for the sum of _____ dollars besides costs of suit

And afterwards to-wit: at the same
term of said Court to-wit: on the 29th day of June in the year
last aforesaid, the following, Among other proceedings, were
had and Entered of record. to-wit:

Frederick Brauhn who sues
for the use of Frederick Bloth

Henry Stibbe

Petition for Mechanic Lien

This day again comes the
said defendant, by Francis W. P. Fuhl his Attorney, and
prays an appeal to the Supreme Court of the State of
Illinois, which is granted by the Court upon condition
that the defendant shall within ten days from this
date, Execute and file with the Clerk of this Court
his appeal bond herein in the penal sum of One thousand
and five hundred dollars. Conditioned according to law
with Michael Mc Caffrey surely Clerk.

13454

from which said judgment the said Henry Hebbe has procured an appeal to the Supreme Court of the State of Illinois, that the condition of the above obligation is such, that if the said Henry Hebbe shall prosecute his said appeal in the effect and shall pay whatever judgment may be rendered by said Supreme Court upon dismissal hearing or other decision of or upon said appeal against him the said Hebbe together with all & every the costs interest & damages that shall accrue or be awarded to the said Braun his heirs & assigns then the above obligation to be void otherwise to be & remain in full force & virtue

State of Illinois }
Cook County } ss Michael McLeaffrey being duly sworn
do depose & say he signed and executed the foregoing Bond, that he is a freeholder and resident of the County of Cook aforesaid & is worth the sum of fifteen hundred dollars over and above all his debts and liabilities & exclusive of property exempt by law from Execution } Mc McLeaffrey
Subscribed and sworn to before me
this 28 day of June A.D. 1859. Wm Church. Clerk

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of summons, Bill, Answer, Replication, Appeal Bond and all the proceedings in a certain cause lately pending in said Court on the Common Law side thereof, wherein Frederick Braun for the use of Frederick Bloch petitioner and Henry Hebbe Defendant.

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court at Chicago, this
Nineteenth day of March

A. D. 1860

Wm Church Clerk.



Supreme Court

Henry Dibble
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Frederick Brauker }

And now comes the said

~~Henry~~ Dibble by Farwell, Smith & Thomas his attorney and says that in the record and proceeding aforesaid and in ~~then~~ giving the judgment or decree aforesaid there is manifest error in this, to wit:

1st - It appears from the statements contained in the Petition that in the contract under which the work was done no time was mentioned within which the work was to be completed, therefore the mechanic had no lien under the Statute, & no decree should have been entered in his favor.

2^d. The decree gives a lien from March 8th 1857 whereas the first contract was not made until March 18th 1857, and the work was not completed until 1st Sept. 1857.

3^d - The decree is erroneous and contrary to law.

Farwell, Smith & Thomas

Atty for Peff

^{1/3}
Circuit Court of Cook Co.

Frederick Braumier

Henry. Hebb

Recd

Filed March 26. 1860
L. Leland
Clerk

fee. 4.25

S U P R E M E C O U R T ,

APRIL TERM, A. D. 1860.

HENRY NIBBE,

V S.

FREDERICK BRAUHN.

APPEAL FROM

Cook County Circuit.

MECHANIC'S LIEN.

ABSTRACT OF RECORD.

On the fifth day of June, A. D. 1858, Brauhn filed his petition to enforce a mechanic's lien against said Nibbe.

3 The petition alleges that on the 18th of March, 1857, the parties entered into
a contract in writing, by which Brauhn was to build a house for Nibbe and have
the same completed on or before first of June, 1857; and Nibbe was to pay for the
8 same \$1935 as follows, viz: \$200 as soon as Brauhn should have brought the bricks
for the foundation and the timber for the house into the lot; \$400 when the roof
was put on; "Six hundred dollars (provided the house is built in accordance with
the specifications, and finished and delivered as above mentioned, on or before the
first day of ~~September~~ ^{June}, 1857), \$600 on the first day of September, 1857, and the
balance, \$735, June 1st, 1858, with interest at ten per cent. per annum since June
first, 1857.

4 The petition also alleges, that on or about the said 18th of March, 1857, Brauhn
did, in accordance with the provisions of the contract, enter upon the erection of the

5 house, and that while laying the foundation Nibbe stated to Brauhn that "he wanted to have certain alterations made in the structure of said house, materially different from the specifications and plans above referred to, and that he wished to have the size of the house increased ;" and that Brauhn "did then and there agree to finish and construct a house upon said premises in accordance with the wishes of said Nibbe, and to make it so far different from the original plan as was then by said Nibbe desired. In consideration whereof, said Nibbe did then and there agree to pay unto Brauhn one hundred dollars over and above the price mentioned in said contract, payable upon the completion of said house and the acceptance thereof by said Nibbe. That at the time of the above mentioned alteration of the original contract nothing was said about the time in which the said house was to be finished, nor was anything said about any alteration of the terms of payment; but said Nibbe was to pay your petitioner one hundred dollars additional on the completion of the work." That Brauhn did thereupon build the house in all respects in conformity with the wishes and requirements of said Nibbe in the premises, and under the immediate direction of said Nibbe, and that on or about the first day of September, A. D. 1857, said Brauhn had the said house fully completed and finished and made delivery thereof to said Nibbe, who then and there accepted the same and declared himself in all respects and fully satisfied with the same." That Brauhn has received \$1200, and that there remains unpaid \$835, and that he has a lien therefor in the premises which he prays may be enforced, &c.

10 The answer of Nibbe admits the making of the agreement of 18th March ; and, also, the subsequent agreement mentioned in the petition, but denies performance on the part of Brauhn.

15 A replication was filed, and on the 7th May, 1859, cause was tried and the jury
17 found for the petitioner damages \$898, and defendant moved for a new trial and the
19, 20 Court decided to grant new trial unless petitioner took judgment for only \$725, to which he consented, and judgment was entered accordingly. And it was also decreed, that all the right, title, claim and demand which the said defendant, on the eighth day of March, 1857, had in and to the premises, and the buildings thereon described in the petition, should be sold by the Master in Chancery to pay the debt and costs. From which judgment and decree, Nibbe took an appeal to this Court.

21

And the said appellant assigns the following as grounds of error appearing upon the record, in this cause :

(3)

1. It appears from the statements contained in the petition, that the mechanic had not any lien, and no decree should have been entered in his favor.

2. The decree gives a lien from March 8, 1857, and the work was not completed until the first of September, 1857.

3. The said decree is erroneous and contrary to law.

FARWELL, SMITH & THOMAS,

Attorneys for Appellants

116 - 118

Supreme Court

Henry Ribbe

Frederick M. Graham

Abstract of Record

Filed April 18, 1860

L. Leland

Clark

Jameson & Morse, Printers, 14 La Salle Street, Chicago.

SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

HENRY NIBBE	}	<i>Appeal from Cook County Circuit.</i> <i>Mechanic's Lien.</i>
vs.		
FREDERICK BRAUHN.		

APPELLANT'S POINTS.

I.

It appears from the statements made in the Petition that the mechanic had not a lien under the statute, for it appears that no time was mentioned within which the work was to be done.

Cook vs. Heald, 21 Ill., 425.

Cook vs. Vreeland, 21 Ill., 431.

Senior vs. Brebnor, 22 Ill., 252.

In the contract as first made, the time of completion was fixed, to wit: June 1st, A. D. 1857. But it seems that soon after the work was commenced, a new contract was made, which provided for a house larger and materially different from the one first contracted for, and Brauhn was to receive one hundred dollars more than the price mentioned in the first contract. What this second or amended contract was, is not stated. But the Petition says, "that nothing was said about the time in which

the house was to be finished." Why was this statement made? To get rid of that provision in the original contract which required, as a condition precedent to payment, that the job should be completed by the 1st June. This was necessary, for if the provision in the original contract as to the time of the completion of the job remained in force, the Petitioner could not recover, for the Petition states that the job was not complete until the 1st of September, 1857.

What does the Petitioner now claim, in view of the recent decisions on this subject? Does he claim that the new contract did not alter the old contract as to the time of completion? Then upon his own showing he cannot recover, for he says he did not complete the work until the 1st of September. The condition precedent was not performed. Does he claim that upon making the new contract he was not bound by the provisions of the old contract as to the time of completion? Then the work was done without any time agreed upon, and he has no lien under the statute.

It does not appear what the proof was on the trial; nor is it important. The proof must follow the allegations in the Petition. If the Petitioner does not set up facts which entitle him to a decree, no amount of proof will entitle him to it.

II.

The decree professes to give a lien from the eighth day of March, 1857, which is ten days before the contract was made. The lien given by the statute attaches from only the completion of the work.

Williams vs. Chapman, 17 Ill., 423.

For this reason also the decree is erroneous.

FARWELL, SMITH & THOMAS,
Att'ys for Appellants.

113-118
Supreme Court

Henry Ribbe
Appellant

^{vs}
Fredrick Brauker
Appellee

Appellants Points

Filed May 2, 1860
L. Leland
Clerk

Forrell Smith
vs Thomas
attys

Superior Court.
of the State of Illinois, 1864.
Dredrick Brankin
for the use of.
Dredrick Platt
and
Henry Ribbes } Mechanics Lien.

It is hereby stipulated and agreed that
the above cause be submitted to the Court
on printed points, and at this term of
said Court.

Chicago May 7th 1864. W. G. Smiley and Nichols
attys for appellee.

Farnell, Smith & Thomas
Attys for Appellant

" Supreme Court
of the April Term A. D. 1860

Daniel Branson for the use of Daniel Stoltz ad. Henry Ribbe	}	Appeal from Cook County Circuit Court Mechanics Lien.
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And hereupon of record is read in the April
Term in the year of our Lord one thousand
eight hundred and sixty, the said Appeal
Daniel Branson for the use of Daniel
Stoltz by M. Stindley and Nicholas his petition
freely comes here into Court and says that
there is no error either in the record and proceedings
aforesaid, or in entering the decree aforesaid, and
he prays that the said Supreme Court before
the aforesaid judges thereof, now here may
please to examine as well the record and
proceedings aforesaid, as the matters aforesaid then
assigned for error, and that the decree aforesaid
in form aforesaid entered, may be in all things
affirmed, and that the said Appeal may accrue
his costs in this behalf expended. &c.
M. Stindley and Nicholas
petitioners for said Appeal

115-118

Duponts Comp^y

Dionisio Beaumont
for use of D. Stöck^{er}

and
Stacey Kibbe

joined in error

Filed Apr. 20. 1860
L. Ireland
Clerk.

M. H. Vindley & Nichols
Sole for appellee

Church, Goodman & Cushing, Printers, 51 and 53 La Salle Street, Chicago.

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1860.

FREDERICK BRAUHN,
FOR THE USE OF
FREDERICK STOLT,
ads.
HENRY NIBBE.

} *Appellee's Points.*

I.

The first and principal Point relied upon by the Appellant to reverse the decree in this case is, that the Petition does not contain an allegation that the work was to be completed within three years after the contract was made, and that therefore it does not allege a compliance with the statute, and does not contain a cause of action.

There are two agreements alleged and set forth in the Petition: the one and first bears date March 18th, 1857; and by this contract the House was to be completed by the 1st of June then next. The Petition alleges, "that in the second agreement (which relates to alterations) there is nothing said about the time when the work was to be completed." And the appellant insists that from this language, to wit: "that there was nothing said about the time for completion of the work;" that the time, which was positively fixed by the first contract for completing the work, was abandoned, leaving no time agreed upon for completing the work. But the appellee claims that as nothing was said in the second agreement about the said time, that the time fixed in the first agreement remains unchanged.

One of these Positions is right, but both cannot be, if there is any ambiguity as to what these parties meant by this language (which we deny) that ambiguity is entirely dispelled by the pleadings in the cause.

The petition alleges, "that in the second agreement nothing was said about the time when said house was to be completed." The answer also alleges, "that in the second agreement nothing was said about the time of completing the work," and the answer further alleges in this connection:

"But that it was understood by and between the said Brauhn and this Defendant, that said House was to be finished at the time agreed upon in the contract first above mentioned."

And this answer is sworn to by the Appellant. He therefore swears in substance that the understanding and agreement of both parties, at the making of both contracts, was that the building was to be completed on the 1st day of June, 1857; this banishes all ambiguity, if there can be any, as to the time the said parties understood and agreed that said work was to be done, and fixes said time, beyond all controversy, on the 1st day of June, 1857. This being the time fixed upon for the completion of said work, it was not actually finished at that time. But the time for the completion of said work was extended by the consent and agreement of both parties, until the 1st of September, 1857, when it was fully completed, and delivered to and accepted by the Appellant, and thus the said first contract was as fully performed by the Appellee as if it had been finished on the first day of June. And this extension of time for the completion of the work, and the acceptance of the same when thus completed, is fully set forth in the Petition.

In the first place the Petition alleges that there were alterations in value to the amount of one hundred dollars to be made to the building; this would require an additional time. And the Petition further alleges, "that the said Brauhn did thereupon build the House in all respects, in accordance with the wishes and requirements of the said Nibbe in the premises, and under the immediate direction of the said Nibbe; that Brauhn fully completed the House on the 1st day of September, 1857, and made delivery thereof to the said Nibbe, who then and there accepted the same, and declared himself in all respects fully satisfied with the same." He is therefore estopped from setting up afterwards that said contract was not completed in time, or at the time first agreed upon. In the case of *Smith vs. Gugerty*, 4th Barb. 614, the Court say, "if the owner permit the builder to proceed with the work after the expiration of the contract time, he waives it," and that such an agreement to extend the time need not be proved by positive agreement, but may be inferred from circumstances. And in the 15th of Johnson 200, *Hasbruck vs. Tappen*, the Court held "that a mere extension of time of the performance of an agreement, is not a waiver of any of its stipulations, and that a mere agreement to extend the time, waves nothing but the time of performance."

And aside from the one hundred dollars which was to be paid for the alterations, there is no pretext that the language used in the second agreement altered the terms of payment in the first agreement; and if the second agreement did not alter or change the terms of payment, it did not alter the time for completing the work, for the language used is identical as to both. In answer, therefore, to the Appellant we claim that the second contract did not alter the first as to the time of completing the work, and that this time was fixed at first on the 1st of June, but was afterwards extended, by the consent of both parties, until the 1st of September,

1857, and that the performance of the work, under the direction of Nibbe, and its completion and delivery to him, and his acceptance of the same on the first of September, and his declaration at the time that he was fully satisfied in all respects with the same, was as full and as perfect completion of the said contract as if said building had been finished on the 1st day of June, and that the appellant's legal and equitable liabilities are in all respects the same.

II.

The second agreement set forth in the petition is an agreement to make alterations to the first contract, and is not an original contract. The parties at all times speak of it as a contract for alterations. The language of the parties used in the petition relative to it is: "At the time of the "above-mentioned alteration of the original contract," &c. And the time for completing the work must be fixed in the original contract, and not in the amendment. See

Cook vs. Vreeland, 21 Ill., 431.

And this was done in this case, and that time was the 1st of June, 1857, and extended until the 1st of September, as stated in the foregoing point.

III.

The alleged defect in the petition, that it fails to state that the work was completed within the time required by the contract, is not assigned for error, and is not before the Court, and even if it had been assigned for error, it would not be well taken, because the defect, if any exists, was cured by the verdict, the appellant having filed his answer without demurring.

See Warren vs. Harris, 2 Gillm., 309.

IV.

The decree giving a lien from the eighth day of March, 1857, although not strictly correct, is not sufficient to reverse the decree. The appellant is the only party affected by the decree, and his rights are not prejudiced by it. But if the Court should regard it as an error, the decree should be reformed in this Court, and not reversed.

McKINDLEY & NICHOLAS,
Att'ys for Appellee.

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Nibbe vs. Braulson

Apples. Print

Filed Nov 8, 1860

L. L. L. L.
Clerk