No. 12770

Supreme Court of Illinois

Hamilton

vs.

Dunn

71641 7

77

77

1859

[2770.

Brandt

Dunn

Mo. for Supers

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James Hamilton
v
Patrick Dunn

Affidavit

Filed May 7 1839
L. Leland
Clerk

United States of America
State of Illinois } S.S.
County of Cook

Pleas before the Honorable John M Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at a regular Term of said Cook County Court of Common Pleas begun and holden at the Court House in the City of Chicago in said County on the first Monday, being the first day of February in the year of our Lord One Thousand Eight Hundred and fifty eight and of the Independence of the United States the Eighty Second –

Present The Honorable John M Wilson Judge
Carlos Haven Pros^t Attorney
John L Wilson Sheriff
Attest. Walter Kimball Clerk

Be it Remembered that heretofore to wit on the twenty second day of December in the year of our Lord One Thousand Eight Hundred and fifty seven Patrick Dunn by E Anthony his Attorney filed in the Office of the Clerk of said Court a certain Petition for Mechanics Lien and exhibit which said Petition and Exhibit are in the

words and figures following to wit.

2

Of the January Vacation Term
Of the Cook County Court of Common
pleas A. D. 1858.

To The Honorable John M Wilson
Judge of the Cook County Court of
Common Pleas.
In Chancery sitting —

State of Illinois }
Cook County } S S.

The Petition of Patrick Dunn
of the County of Cook and State of Illinois
aforesaid
Showeth

That on the fourth day of November
A. D. 1857. James Hamilton of Cook County, Illinois
was in possession and claimed and pretended to
be the owner and your petitioner verily believes
was seized in fee of the following described
premises to wit Lot number One in Block
Eight of Newberry addition to the City of
Chicago being the corner lot of the North East
corner of Wells street and Michigan Street
in the City of Chicago County of Cook and
State of Illinois aforesaid

And your Petitioner further sheweth

3

that he is a mechanic towit a plaster and mason and that on the same day and year aforesaid the said James Hamilton entered into an agreement with your petitioner whereby your petitioner agreed to do all the plastering for the said James Hamilton that was required to be done at the house of the said James Hamilton aforesaid which house was and is situated on the premises above described at the North East corner of Wells and Michigan Street in the City of Chicago and also to furnish all the materials and labor that might be required for the plastering aforesaid and also to put on one good and substantial Coat of good Strong Mortar and good sound laths together with two good thick Coats of White wash for a certain Consideration mentioned in said agreement which said agreement was reduced to writing and signed & sealed by your petitioner and the said James Hamilton respectively which said agreement is hereunto annexed and marked Exhibit "A" which is hereby made a part of this petition.

And your petitioner sheweth that after the execution of said agreement by your petitioner and the said James Hamilton and before the time therein mentioned for the completion of said work mentioned in said Agreement towit on the 5th day of November

[12770-2]

4 A.D. 1857. Your petitioner entered upon the performance of the said agreement and did then and there furnish material and provide men and did then and there proceed to put on good and sound laths on the house of the said James Hamilton situated on the premises before mentioned and also to put on the said House one good and substantial Coat of Strong Mortar which work your petitioner avers he did in a good and workmanlike manner in all respects as mentioned and described in the said Agreement in writing made by and between your petitioner and the said James Hamilton aforesaid as far as the same was performed by your petitioner

And your petitioner further shows and charges the fact that he proceeded to perform said work and said agreement in all respects as fast as the weather and the men would permit as agreed by and between your petitioner and the said James Hamilton and that he would have finished and fully completed the plastering and all the work specified in said Agreement to be done performed at the house of the said James Hamilton at the time specified in the said agreement made by and between your petitioner and the said James Hamilton had not the

5- weather been so cold and unfavorable as to hinder and delay your petitioner and had not also the said James Hamilton hindered and prevented your petitioner from performing his said agreement as hereafter set forth.

Your petitioner further shows that he continued the prosecution of said work until on or about the 13th or 14th day of November, that at that time the weather became very cold and stormy and that it continued so for several days so that little work could be done. and that he was hindered and delayed by the same and that he was also hindered and delayed by said Hamilton & by persons in his employ - That said Hamilton had at that time persons in his employ doing carpenters work on the said House - And that said persons so in the employ of the said Hamilton were to get the House, especially and the doors & windows ready for putting on the lath but that they did not do so. And that by reason thereof your petitioner was by them much hindered and delayed so that your petitioner could not finish the plastering & the lathing as soon as he otherwise would - Moreover your petitioner shows that he was frequently interrupted by the said Hamilton himself who on or about the 14th day of November

drove him away from said premises by force.
6 Your Petitioner further shows that notwith-
-standing he was thus delayed in the manner
above mentioned and nothwithstanding
he was thus driven away by said Hamilton
he returned to said work and continued the
prosecution of the work until on or about
the second day of December A.D. 1857 - when
he was forcibly ejected from said premises
by said Hamilton & prevented from the
further prosecution of said work although
Your Petitioner was ready and willing and
offered to complete said agreement in all
respects as he had agreed.

Your Petitioner further sheweth
that at the time when he was ejected from
said premises and finally driven away by
said Hamilton to wit on or about the
second day of December A.D. 1857. that he
had finished the first Coat of plastering
in all respects as agreed by and between
Your Petitioner & the said James Hamilton
& that there is now due to Your Petitioner
from the said James Hamilton for
material furnished & used on the house
of the said Hamilton situate on the premises
above described and for work and labor
done & performed on said premises in accordance
with the Agreement made by and between

7

your petitioner and the said James Hamilton the sum of Two Hundred Dollars.

Your petitioner further showeth that by reason of the Refusal of the said Hamilton to perform his part of the said Agreement according to the terms thereof And by reason of the said Hamilton preventing your petitioner from performing the said Agreement on his part. that he has suffered great damages to wit the sum of Two Hundred Dollars

Wherefore your petitioner prays Judgment against the said James Hamilton for the amount so due to your petitioner and that the said Judgment may be a lien upon the premises hereinbefore described with the said House thereon pursuant to the Statute in such Case made and provided & for such other and further relief as this Court shall deem proper to grant

E Anthony
Attorney for Plaff

Patrick Dunn

Exhibit "A."

This Agreement made this fourth day of November 1857. by & between Patrick Dunn of the first part & James Hamilton of the Second part both of the City of Chicago

[12770-4]

State of Illinois Witnesseth that the
8 said Dunn party of the first part bargains
and agrees with the said Hamilton party of
the second part to do all the plastering that
is required to be done at the House of the said
party of the second part on the Cor. of Wells &
Michigan Streets, to furnish all material &
labor that may be required for same - The said
party of the first part agrees to put on one good
substantial Coat of good strong Mortar - also
good sound laths together with two good thick
Coats of White wash for the Sum of twenty
cents per square yard also two good Coats
the last one a hard finish for the Sum of
twenty four cents per square yard - It is
further agreed and expressly understood
that the party of the second part will direct
in writing what portion is to be hard finish
& what is not the entire first Coat to be put
on before the fourteenth Nov. 1857. & the last
& finishing Coats before the twenty fifth
Nov 1857. The two Stores to be finished
first & as quick as the plaster will dry
that is to say before the entire first Coat is
put on - The party of the second part will
not suffer nor allow any unnecessary delay
on his part to retard the the work - The said
Work is to be finished in the best & most
Workman like manner & when finished

to be subject to the approval of a Competent
9 Architect. The party of the second part agrees
to pay to the party of the first part for the
above named work in the following manner
that is to say One Eighth (1/8) of the whole
amount when the entire first coat is completed.
One Eighth (1/8) of the balance when the entire
work is completed & the balance in one hundred
and twenty days after the work is completed
as herein stated – The party of the first part
agrees to put the work through as fast as
men & weather will permit & to allow no time to
be lost – half the door openings on the first &
second floor and also the Window openings
are to be measured & allowed as work done in
this Contract The said work to be commenced
after the ensealing of this Contract that is to
say, on the 5th instant – In Witness
whereof we have hereunto set our hands and
seals the day & year above written.

Witness — Patrick Dunn (L.S.)

Wilson Wells. — James Hamilton (L.S.)

And afterwards towit on the same
day and year last aforesaid the said
patrick Dunn by E Anthony his Attorney
aforesaid filed in the Office of the Clerk of
said Court a certain precipe for Summons
which said precipe is in the words and

figures following to wit

10 State of Illinois
County of Cook } S.S.

Cook County Court
Of Common Pleas.
January Vacation Term A D 1858.

Patrick Quinn
vs
James Hamilton

The Clerk of said Court will issue a Summons in the above Cause directed to the Sheriff of County in a plea of Mechanics Lien returnable at the January Vacation Term of said Court A D 1858 - To the Damage of the plaintiff of Two Hundred Dollars.

Elliott Anthony Plaintiffs Attorney

To Walter Kimball Esq Dec 21 1858
Clerk - Chicago -

And on the same day and year last aforesaid there issued out of the Office of the Clerk of said Court a Writ of Summons, which said Summons with the Sheriff's return thereon is in the words and figures following to wit.

State of Illinois
County of Cook } S.S. The People of the State
Of Illinois -

To the Sheriff of said County - Greeting

11

We command you that you summon James Hamilton if he shall be found in your County personally to be and appear before the Cook County Court of Common Pleas day of the next Term thereof to be holden at the Court House in the City of Chicago in the said County on the first of said County, on the first Monday of January next to answer unto Patrick Dunn in his certain petition for mechanics Lien filed in said Court.

And have you then and there this Writ with an indorsement thereon in what manner you shall have executed the same -

Witness Walter Kimball Clerk of our said Court and the Seal thereof at the City of Chicago in said County this 22 day of December A.D. 1857.

(Seal)

Walter Kimball Clerk.

Sheriff's Return

Served on the within named James Hamilton by delivering a Copy to him

Dec 23 1857.

John S Wilson Shff

By S Taylor Deputy.

And afterwards to wit on the thirteenth day of February in the year of our Lord One Thousand Eight hundred and fifty eight

12 the said James Hamilton by Myron C Parsons his Attorney filed in the Office of the Clerk of said Court his Affidavit for Bond for Costs - which said Affidavit follows in these words - to wit -

Cook County Court of Common Pleas.

February Term A.D. 1858.

State of Illinois }
Cook County } ss.

James Hamilton }
ats } Petition for Mech's Lien -
Patric Dunn. }

James Hamilton personally appears and being first duly sworn deposes and says. that he is the defendant in the above entitled suit; that he is well acquainted with and has for some months last past well known the said Patric Dunn the plaintiff in said suit both personally and by reputation.

That the said Patric Dunn according to his own statements and admissions made to this affiant on or about the first day of December last pas was and according to the best of his, this affiants knowledge information and belief, still is utterly insolvent and has no goods estate or effects liable to execution whereform such costs or any part

13

thereof as the said Patric Dunn may be decreed or adjudged to pay in the above entitled Cause can be made levied or satisfied –

This Affiant further says that he has as he is informed by his Counsel and verily believes, a good full and sufficient defence to the above entitled suit on the merits thereof – And that his proceedings in this behalf are not in any manner interposed or intended to delay or retard the trial of the same –

This Affiant therefore prays that a rule may be entered in the above entitled Cause requiring the said Patric Dunn within such time as this Court in its discretion, shall see fit, to file good and sufficient Security for such Costs as may accrue therein and in default thereof that said suit may be dismissed according to the form force and effect of the Statute in such case made and provided –

James Hamilton

Subscribed Sworn to before me this 8th day of February A.D. 1858 –

Walter Kimball
Clerk.

14 And afterwards to wit on the same day and year last aforesaid the same day being one of the days of the Court aforesaid the following, among other proceedings, was had in the said Cause and entered of Record to wit.

Patrick Dunn
" } Petition for Mechanics
James Hamilton } Lien.

This day comes the said Defendant by M C Parsons his Attorney and enters his motion herein for a Rule on said Petitioner to file Security for Costs in this cause or shew cause why he should not.

And afterwards to wit on the twenty fifth day of February in the year aforesaid the said Patrick Dunn filed in the Office of the Clerk of said Court his Affidavit, which Affidavit is in the words and figures to wit

State of Illinois
Cook County } s.s.

Patrick Dunn of said County being duly sworn deposes and says that he is a mason by trade and that James Hamilton the Defendant in this suit is justly indebted to this

15 Deponent in a large sum of money to wit the sum of about Two Hundred Dollars for work labor and services done and preformed by this Deponent for said Hamilton and that said suit herein was commenced against said Hamilton to recover said sum of money - that this Deponent is not insolvent although a poor man, and that if said Hamilton would pay this Deponent what is justly his due he could pay all the Debts he owes in the world - this Deponent further says that he does not know what the costs of the Court in his case may be but that if they do not amount to a large sum of money he will be able to pay them without difficulty especially if said Hamilton pays him what is now justly his due this Deponent further saith that he is now and has been for about a year a resident of the City of Chicago And that he has no other residence whatever And further this Deponent saith not

Patrick Dunn

Subscribed & sworn to
before me this 15th day
of February A D 1858.

E Anthony
Notary public.

[12770-7]

16 And afterwards to wit on the twenty sixth day of February aforesaid in the year last aforesaid the same day being one of the days of the Court aforesaid, the following among other proceedings, was had in the said Court, and entered of Record - to wit

Patrick Dunn
vs
James Hamilton
} Petition for mechanics Lien.

And now comes the said petitioner by Elliott Anthony his attorney and the Defendant by his said Attorney also come And the Court after hearing the said Defendants' motion for a Rule on said Petitioner to file security for costs herein overruled said motion.

And thereupon on motion of said petitioner it is ordered that the petition in this cause be taken as confessed against the said Defendant for want of an answer, and that a Jury come to assess the said Petitioners damages And thereupon come a Jury of good and lawful men to wit W Huff. J P Mills. G G Chilcott B Chase W H Dodge. Wm Orcutt. A. S. Fay. Wm Coleman Thos Conners W H Woods Wm Cooper & J M Bonghardt who being duly elected

and sworn well and truly to enquire of the
17 said petitioners damages and true assessment
make thereof after hearing the testimony
adduced on the part of said petitioner and
said Defendant retire to consider of their Verdict
And it is Ordered by the Court that the Jury
after having agreed upon their Verdict may
reduce the same to writing sign & seal the same
and afterwards be permitted to separate And that
they meet the Court at the opening thereof tomorrow
morning -

And afterwards to wit on the twenty
seventh day of February in the year last
aforesaid the said day being one of the days
of the Court aforesaid, the following among
other proceedings was had in the said Court
and entered of Record to wit

Patrick Dunn
vs
James Hamilton } Petition for Mechanics Lien.

And now again come the
parties aforesaid by their Attorneys aforesaid
And the Jury empannelled in the Cause on
Yesterday als come into Court and say We
say We the Jury assess said petitioners
damages to the Sum of One hundred
and ninety four Dollars

And thereupon said Defendant

18 enters his motion herein to set aside the Default in this Cause and also for a reassessment of damages and for leave to file his answer herein - which motions after being heard by the Court are overruled to which ruling of the Court the said Defendant excepts - Therefore it is considered by the Court that the said petitioner do have and recover of the said Defendant the said Sum of One hundred and ninety four Dollars in form aforesaid by the Jury here assessed and also his Costs and Charges by him about his Suit in this behalf expended -

And it is further Ordered that the said Petitioner have a Mechanics Lien upon the said premises described in his said petition to wit upon Lot number One (1) in Block eight (8) of Newberry's addition to the City of Chicago, being the Corner lot of the North East corner of Wells Street and Michigan Street in the City of Chicago, County of Cook & State of Illinois together with the buildings thereon situate, And the said Petitioner have execution against said premises to make the amount of the said Sum of One hundred & thirty four Dollars and Costs aforesaid - And thereupon said Defendant prays an appeal to the

Supreme Court of the State of Illinois which is allowed on his filing his appeal Bond in the Sum of four hundred Dollars with Security to be approved by the Judge of this Court, said Bond to be filed in ten days from this day and his Bill of Exceptions to be prepared & filed herein by the fifteenth day of March next.

19

And afterwards to wit on the sixth day of March in the year last aforesaid the said James Hamilton Defendant in the above Cause filed in the Office of the Clerk of the said Court his Appeal Bond - which said Bond is in the words and figures following to wit:

Know all Men by these presents that We James Hamilton and John Dewitt are held and firmly bound unto Patrick Dunn in the penal Sum of Three Hundred and fifty Dollars lawful Money of the United States for the payment of which well and truly to be made We bind ourselves our heirs Executors & administrators jointly Severally and firmly by these presents -

Witness our hands and Seals this 5th day of March A. D. 1858.

20 The condition of the foregoing Obligation is such that whereas on the 26th day of February A.D. 1858. at a term of the Cook County Court of Common Pleas begun and held at Chicago within and for the County of Cook and State of Illinois on the first Monday of February A.D. 1858 by the consideration and judgment of the said Court in a certain Suit or petition for a Mechanic's Lien then and there pending between the said Patric Dunn as petitioner and the above bounden James Hamilton as Defendant It was then and there Ordered adjudged and decreed that the said Patric Dunn have and recover of and from the said James Hamilton the Sum of One hundred and ninety four Dollars and

Cents as and for his damages by him in that behalf sustained together with the further Sum of

Dollars and Cents for his costs and Charges by him about his Suit in that behalf expended - from which Judgment or decree the said James Hamilton has taken an Appeal to the Supreme Court of the State of Illinois at a term thereof to be held at Ottawa within and for the third division of the said State of Illinois on the first tuesday after the third

Monday of April A.D. 1858 Now if
21 the said James Hamilton shall duly
prosecute his said Appeal and in case of the
affirmance of the aforesaid Judgment or
decree shall well and truly pay or cause to
be paid all such Judgment or decree
and all the Costs and Charges aforesaid
together with all such Judgment Costs
interest and damages as may be awarded
by said Supreme Court upon the dismissal
or trial of said Appeal then the above
Obligation to be void otherwise to remain
in full force and effect.

Approved John M Wilson Judge of the Arch Co Ct of C Pleas. } James Hamilton (L.S.) John Dewitt (L.S.)

And afterwards towit on the
thirteenth day of March in the year
last aforesaid the said day being one
of the days of the February Term of the Court aforesaid
the following, among other proceedings, were
had in the said Court and entered of
Record towit

Patrick Dunn
vs. } Petition for Mechanics Lien
James Hamilton

On Motion of said Defendant
It is Ordered that the time to file his Bill
of Exceptions in this Cause be extended to

the twenty second day of March instant -

And afterwards to wit on the twentieth day of March in the year last aforesaid the said James Hamilton filed in the Office of the Clerk of the said Court his Bill of Exceptions which said Bill is in the words and figures following that is to say.

James Hamilton
ats
Patric Dunn

Be it remembered that on the thirtieth day of February in the year One Thousand Eight Hundred and fifty eight at a term of the Cook County Court of Common Pleas begun and held at the Court House in the City of Chicago within and for the County of Cook on the first Monday of February in the year aforesaid came the said Defendant by Myron O Parsons his Attorney and moved the Court to rule the plaintiff in said Cause to file security for costs therein - And in support of such motion then and there submitted and read the affidavit of him the said Defendant in the words and figures following, that is to say

Cook County Court of Common Pleas

State of Illinois } February Term A.D. 1858.
Cook County } ss.

James Hamilton
vs. } Petition for Mechanics Lien
Patrick Dunn.

James Hamilton personally appears and being first duly sworn, deposes and says that he is the Defendant in the above entitled suit; that he is well acquainted with and has for some months last past well known the said Patrick Dunn the plaintiff in said suit both personally and by reputation

That the said Patrick Dunn according to his own statements and admissions made to this affiant, on or about the first day of December last past was and according to the best of his this Affiants knowledge information and belief still is utterly insolvent, and has no goods estate or effects liable to execution whereform such costs or any part thereof as the said Patrick Dunn may be decreed or adjudged to pay, in the above entitled cause, can be made levied or satisfied

This affiant further says that he has as he is informed by his Counsel and truly believes a good full and sufficient defence to the above entitled suit on the merits thereof and that his proceedings in this behalf are not in any manner interposed

or intended to delay or retard the trial of

24 the same —

This affiant therefore prays that a rule may be entered in the above entitled Cause requiring the said Patric Dunn within such time as this Court in its discretion shall see fit to file good and sufficient security for such Costs as may accrue therein and in default thereof, that said suit may be dismissed according to the form force and effect of the Statute in such case made and provided

James Hamilton

Subscribed & sworn to before me
this 8th day of Feb'y A D 1858

Walter Kimball Clerk.

Which said Motion remained pending and undecided before the said Court until the twenty sixth day of February in the year aforesaid and until the day next following that on which the said Cause was set for trial on the docket of said Court when the said Cause being then and there called for trial the said plaintiff by Elliott Anthony his Attorney came and resisted the said motion and then and there submitted and read the counter affidavit of him the said plaintiff in the words and figures following that is to say

State of Illinois
Cook County } ss.

25

Patric Dunn of said County being duly sworn deposes and says that he is a mason by trade and that James Hamilton the Defendant in this suit is justly indebted to this Deponent in a large sum of money to wit the sum of about two hundred Dollars for work labor and services done and performed by this Deponent for said Hamilton and that said suit herein was commenced against said Hamilton to recover said sum of money, that this Deponent is not insolvent although a poor man - And that if said Hamilton would pay this Deponent what is justly his due he could pay all the debts he owes in the world - This Deponent further says that he does not know what the costs of the Court in his case may be but that if they do not amount to a large sum of money he will be able to pay them without difficulty especially if said Hamilton pays him what is now justly his due - This Deponent further saith that he is now and has been for about a year a resident of the City of Chicago and that he has no other residence whatever And further this Deponent saith not -

Patrick Dunn

Subscribed & sworn to before me this 15th day of February AD 1858.

E Anthony
Notary Public -

[12770-12]

26 Whereupon the said Court upon hearing the foregoing Affidavits read, there being no other or further evidence adduced by the said parties to support or resist said Motion then and there overruled the same to which said Decision of the said Court in overruling said motion the said Defendant then and there excepted.

The said Plaintiff by his Counsel thereupon then and there moved the said Court for a decree pro confesso against the said Defendant for want of an answer by him filed in said Cause and the said Defendant then and resisted such motion And thereupon then and there by his Counsel presented his answer in said Cause and made his cross motion for leave to file the same instanter. And thereupon the said Court then and there decided that the motion for a decree pro confesso in said Cause be sustained and that the cross motion for leave to file an answer therein be overruled, to which decision of the said Court in sustaining said motion for a decree pro confesso and in overruling said cross motion for leave to file an answer the said Defendant by his Counsel then and there excepted

Be it also Remembered that on the day and year last aforesaid by Order of the said Court a Jury was empannelled to assess the damages of the said plaintiff in said Cause and after hearing the testimony adduced by the said parties respectively

27

the Jury aforesaid on the day next thereafter ensuing to wit on the twenty seventh day of February in the year aforesaid, came first duly called came into the said Court and delivered their verdict in said Cause whereby they the said Jury assessed the damages of the said Plaintiff at the Sum of One hundred and ninety four Dollars

Whereupon the said Defendant by his Counsel moved the said Court to set aside the said assessment of the said Jury and the decree pro confesso in said cause and for leave to file his answer therein which motion the said Court then and there overruled to which decision of the said Court in overruling ~~the said~~ such motion the said Defendant by his Counsel then and there excepted - The said Defendant by his Counsel then and there further moved the said Court to set aside the said assessment of the said Jury which said last mentioned motion the said Court then and there overruled, to which decision of the said Court in overruling the said last mentioned motion the said Defendant by his Counsel then and there excepted - And tendered to the said Court this his Bill of Exceptions which the said Court has signed and sealed according to the Statute in such case made and provided -

John M Wilson (Seal)

State of Illinois
County of Cook } S.S.

28

I. Walter Kimbark Clerk of Cook County Court of Common Pleas in and for said County, do hereby certify that the above and foregoing is a full and true Transcript of all the papers on file in my office and of the proceeding entered of Record in said Court in the Case in which Patrick Dunn is Plaintiff and James Hamilton Defendant in a certain Petition for Mechanics Lien.

In testimony whereof I hereunto subscribe my name, and affix the Seal of said Court at the City of Chicago in said County this 27th day of March AD 1858 Walter Kimbark Clerk

State of Illinois }
Third Grand Division } ss.

Supreme Court, in and for the Third Grand Division of the State of Illinois, on April Term A.D. 1858.

James Hamilton
Appellant,
vs.
Patric Dunne
Appellee.

Afterwards, to wit, on the first Thursday in this same term, before the Judges of the Supreme Court of the People of the State of Illinois, at the Court House in the City of Ottawa, comes the said James Hamilton, by Myron K. Parsons his Attorney, and says, that in the record and proceedings aforesaid, and also in rendering the decree aforesaid, there is manifest error in this, to wit;

(29)

First: That the motion for security for costs, by the said James Hamilton in that behalf made, was overruled,

Second; That the motion for a decree pro confesso, by the said Patric Dunne in that behalf made, was granted,

Third: That the cross-motion for leave to file his answer instanter, by the said James Hamilton in that behalf made, was overruled.

Fourth: That the motion to set aside the assessment of the jury, and the decree pro confesso, and for leave to file his answer, by the said James Hamilton in that behalf made, was overruled.

Fifth: That the motion to set aside the assessment of the jury, by the said James Hamilton in that behalf made, was overruled.

Sixth: That the petition aforesaid, and the matters therein contained, are not sufficient in law for the said Patric Dunn to have or maintain his aforesaid action thereof against the said James Hamilton.

Seventh: That the petition aforesaid, and the matters therein contained, do not entitle the said Patric Dunn to any such relief as therein is prayed.

(30)

Eighth: That by the record aforesaid, it appears that the decree aforesaid, in form aforesaid rendered, was rendered for the said Patric Dunn, against the said James Hamilton, whereas by the law of the land, the said decree ought to have been rendered for the said James Hamilton, against the said Patric Dunn.

And the said James Hamilton prays that the decree aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed and annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by reason thereof etc.

Moyrow & Parsons

Attorney for Appellant.

In Nullo est erratum

E. Anthony atty
for Appellee

Cook Co. Ill. of Cir. Ct.

235

Neal Lunn

vs

James Hanion

Record & asst. of Errors

Filed April 22 1848

C. Kellond

Clk

Sawyer

H & P. Clk

Parsons

Fee $7.50

State of Illinois, } SS.
THIRD GRAND DIVISION,

SUPREME COURT, IN AND FOR THE THIRD GRAND DIVISION OF THE STATE OF ILLINOIS—APRIL TERM, A. D. 1858.

JAMES HAMILTON, *Appellant,*
vs.
PATRICK DUNN, *Appellee.*

PETITION FOR MECHANIC'S LIEN.

APPEAL FROM COOK.

MYRON C. PARSONS, *Solicitor for Appellant.*

ELLIOT ANTHONY, *Solicitor for Appellee.*

ABSTRACT OF THE RECORD.

1 The plaintiff in the Court below filed his petition therein, on the twenty-second day of December, A. D. 1857.

2 PETITION.

OF THE JANUARY VACATION TERM OF THE COOK COUNTY COURT OF COMMON PLEAS, A. D. 1857.

2 *To the Honorable John M. Wilson, Judge, etc.:*

IN CHANCERY SITTING.

STATE OF ILLINOIS, } SS.
COOK COUNTY.

The Petition avers:

2 1st. That on the fourth day of November, A. D. 1857, the appellee
3 agreed in writing with the appellant to do all plastering, and furnish all materials and labor requisite for plastering appellant's house, which agreement is annexed to petition marked exhibit "A."

3 2nd. That on the fifth day of November, A. D. 1857, the appellee
4 commenced work under the agreement, furnished material, provided men, and put on laths and one coat of mortar, in all respects as provided in the agreement, so far as the work was done.

4 3d. That the appellee performed the work as fast as weather and men would permit, and would have completed the same as specified in the
5 agreement, had he not been delayed by cold weather, and prevented by the appellant from so doing.

5 4th. That the appellee continued the work until about the 13th or 14th day of November, when he was hindered from prosecuting the work

by cold weather, and by the appellant and persons in his employ, who did not finish the carpenter's work as agreed, and that about this time, the
6 appellee was driven away from the premises by the appellant.

6 5th. That appellee resumed and continued work until about the second day of December, A. D. 1857, when he was ejected from the premises by the appellant, and prevented from prosecuting the work, though ready, and offering to complete it, in all respects as provided in the contract.

6 6th. That at the time when the appellee was ejected from the premises, he had finished the first coat of plastering in all respects as agreed, "and "that there is now due to your petitioner (appellee) from the said James "Hamilton (appellant) for material furnished and used in the house of "the said Hamilton, situate on the premises above described, and for "work and labor done and performed on said premises in accordance with
7 "the agreement made by and between your petitioner and the said James "Hamilton, the sum of two hundred dollars."

7 "Your petitioner further sheweth that by reason of the refusal of the "said Hamilton to perform his part of the said agreement according to the "terms thereof, and by reason of the said Hamilton preventing your peti-"tioner from performing the said agreement on his part, that he has "suffered great damages, to wit, the sum of two hundred dollars."

7 "Wherefore your petitioner prays judgment against the said James "Hamilton for the amount so due to your petitioner, and that the said "judgment may be a lien upon the premises hereinbefore described, with "the said house thereon, pursuant to the statute in such case made and "provided," and for general relief.

Words in quotation marks copied from petition verbatim.

7 The agreement marked exhibit "A," provides that the appellee shall
8 do all plastering and furnish all labor and material requisite for plastering the appellant's house.

That he shall put on one good coat of mortar, good laths, with two good coats of whitewash, for twenty cents per square yard; also two coats, the last a hard finish, for twenty-four cents per square yard.

The appellant to direct in writing what portion to be hard finish. First coat to be put on before the fourteenth day of November, A. D. 1857. Last coats before the twenty-fifth day of November, A. D. 1857.

The appellant not to allow delay on his part to retard the work. "The said work is to be finished in the best and most workmanlike manner, and
9 when finished, to be subject to the approval of a competent architect."

The appellant to pay for work as follows: one-eighth of whole amount when first coat is completed, one-eighth of balance when entire work is completed, and the balance in one hundred and twenty days after completion of work. Work to be done as fast as men and weather will permit, and to be commenced on the fifth day of November, A. D. 1857. Words in quotation marks above are copied verbatim from agreement.

10 Process issued returnable to January Vacation Term, A. D. 1858.
11 Served on the appellant the twenty-third day of December, A. D. 1857.

11 On the thirteenth day of February, A. D. 1858, the appellant appeared and filed the following Affidavit:

12 "COOK COUNTY COURT OF COMMON PLEAS.

FEBRUARY TERM, A. D. 1858."

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

"JAMES HAMILTON, } PETITION FOR MECHANIC'S LIEN."
ats.
PATRICK DUNN."

"James Hamilton personally appears, and being first duly sworn, "deposes and says that he is the defendant in the above entitled suit; that "he is well acquainted with, and has, for some months last past, well "known the said Patrick Dunn, the plaintiff in said suit, both personally "and by reputation. That the said Patrick Dunn, according to his own "statements and admissions made to this affiant on or about the first day "of December last past, was, and according to the best of his, this affiant's, "knowledge, information and belief, still is, utterly insolvent, and has no "goods, estate or effects liable to execution, wherefrom such costs, or any "part thereof, as the said Patrick Dunn may be decreed or adjudged to "pay in the above entitled cause, can be made, levied or satisfied. This "affiant further says that he has, as he is informed by his counsel and "verily believes, a good, full and sufficient defence to the above entitled "suit on the merits thereof, and that his proceedings in this behalf are not "in any manner interposed or intended to delay or retard the trial of the "same. This affiant therefore prays that a rule may be entered in the
13 "above entitled cause, requiring the said Patrick Dunn within such time as "the Court, in its discretion, shall see fit, to file good and sufficient security "for such costs as may accrue therein, and in default thereof, that said suit "may be dismissed, according to the form, force and effect of the statute in "such case made and provided."

The foregoing affidavit is copied verbatim from the record.

14 The appellant moved for security for costs, on the foregoing affidavit, on the thirteenth day of February, A. D. 1858.

14 On the twenty-fifth day of February, A. D. 1858, the appellee filed the following Affidavit:

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

14 "Patrick Dunn, of said County, being duly sworn, deposes and says "that he is a mason by trade, and that James Hamilton, the defendant in
15 "this suit, is justly indebted to this deponent in a large sum of money, to "wit, the sum of about two hundred dollars, for work, labor and services "done and performed by this deponent for said Hamilton, and that said "suit herein was commenced against said Hamilton to recover said sum of "money, that this deponent is not insolvent although a poor man, and that "if said Hamilton would pay this deponent what is justly his due, he could "pay all the debts he owes in the world. This deponent further says that "he does not know what the costs of the Court in his case may be, but that "if they do not amount to a large sum of money, he will be able to pay "them without difficulty, especially if said Hamilton pays him what is now

"justly his due. This deponent further saith that he is now and has been "for about a year a resident of the City of Chicago, and that he has no "other residence whatever. And further this deponent saith not."

Words in quotation marks copied verbatim from the record.

16 On the twenty-sixth day of February, A. D. 1858, the Court overruled the motion for security for costs, the cause having been then called for trial, and granted motion of appellee that petition be taken pro confesso, for want of answer, and that a jury be forthwith impanelled to assess the damages. Overruled appellant's cross-motion for leave to file his answer instanter.

17 On same day, cause submitted to the jury, who returned their verdict on the twenty-seventh day of February, A. D. 1858, and assessed the appellee's damages at one hundred and ninety-four dollars.

17 On the twenty-seventh day of February, A. D. 1858, the appellant
18 moved to set aside the default, assessment of damages, and for leave to file his answer. Motion overruled, and decree rendered for appellee.

18 Appeal prayed by appellant.

19 Leave given to file bond in ten days from the twenty-seventh of February, A. D. 1858. Leave to file exceptions till the fifteenth day of March, A. D. 1858. Bond filed on the sixth day of March, A. D. 1858.

21 On the thirteenth day of March, A. D. 1858, leave to file exceptions extended to the twenty-second day of March instant.

22 On the twentieth day of March, bill of exceptions filed.

22 EXCEPTIONS.

26 1st. That "the said Court, upon hearing the foregoing affidavits read, "there being no other or further evidence adduced by the said parties to "support or resist said motion" (motion for security for costs), then and "there overruled the same," etc. Verbatim from the record.

26 2nd. That the Court granted appellee's motion for a decree pro confesso, and overruled appellant's cross-motion for leave to file his answer instanter.

27 3d. That the Court overruled the motion of the appellant to set aside the assessment of the jury, and the decree pro confesso, and for leave to file his answer.

27 4th. That the Court overruled the motion of the appellant to set aside assessment of the jury.

State of Illinois }
Third Grand Division } ss..

Supreme Court in and for the Third Grand Division of the State of Illinois. — April Term A.D. 1858

James Hamilton
Appellant.

vs.

Patrick Dunn
Appellee

Afterwards, to wit, on the first Thursday, in this same term, before the Judges of the Supreme Court of the People of the State of Illinois, at the Court House in the City of Ottawa, comes the said James Hamilton, by Myron C. Parsons his Attorney and says, that in the record and proceedings aforesaid, and also in rendering the decree aforesaid, there is manifest error in this, to wit:

First: That the motion for security for costs, by the said James Hamilton in that behalf made was overruled.

Second: That the motion for a decree pro confesso, by the said Patrick Dunn in that behalf made, was granted.

Third: That the Cross-motion for leave to file his answer instanter, by the said James Hamilton in that behalf made, was overruled

Fourth: That the motion to set aside the assessment of the jury, and the

[10774-21]

decree pro confesso, and for leave to file his answer, by the said James Hamilton in that behalf made, was overruled.

Fifth: That the motion to set aside the assessment of the jury, by the said James Hamilton in that behalf made, was overruled.

Sixth: That the petition aforesaid and the matters therein contained are not sufficient in law for the said Patric Dunn to have or maintain his aforesaid action thereof against the said James Hamilton.

Seventh: That the petition aforesaid and the matters therein contained, do not entitle the said Patric Dunn to any such relief as therein is prayed.

Eighth: That by the record aforesaid, it appears that the decree aforesaid, in form aforesaid rendered, was rendered for the said Patric Dunn, against the said James Hamilton, whereas by the law of the land, the said decree ought to have been rendered for the said James Hamilton, against the said Patric Dunn. And the said James Hamilton prays, that the decree aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed and annulled, and altogether held for nothing, and that he may be restored to all things which he hath lostby reason thereof etc —

In nullo est erratum
[12770-23]
E. Carthon
for defd in error

Myron C. Parsons
Atty for Appellant.

And now comes the said defendant in error by E. Anthony his atty. and says that there is no error in the record & proceedings aforesaid & in the rendition of the judgment aforesaid & taking the said decree &c & prays the court to examine the same & that the same may be in all things affirmed &c —

E. Anthony atty
for appellee

235 ~~14~~
James Hamilton
77 vs
Patrick Dunn
Record & abstract
Assignment of Errors

Filed April 22 1858
Wm Leland
Clk

Filed May 12 1858
Wm Leland
Clk

Decree

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1859.

JAMES HAMILTON,
vs.
PATRICK DUNN.
} *Appeal from Cook Common Please.*

POINTS FOR APPELLANT.

The points I make in this case are:

I.

That the affidavits showed a state of facts which entitled the defendant below to security for costs.

The statute has authorized—indeed requires the court to order such complainants as Dunn to give security for costs.

Cooke Stat., p. 244, Sec. 2.

II.

Upon determining this preliminary question, the defendant below had a legal right to file his answer, which he *immediately* offered to do, and to make his defence to the complaint.

See Cooke Stat., p. 140–1, Secs. 15, 18, 22, 34.

I shall not attempt to hunt up authorities upon a proposition so plain. Indeed, I doubt whether an authority can be found; for, I confess that the annals of civil jurisprudence have not a parallel case of a court's having flatly and simply denied a party a right to make a defence to a suit where he was not in default as to time, but was, and had been, diligently pressing his equitable rights.

I am as much at a loss to find out any justice in this proceeding as I am to see the motive that prompted the denial of defendant's right.

W. B. SCATES, for Appellant.

77

Hamilton vs Dunn

Appellants Brief

Filed May 16. 1859
L. Leland
Clerk

State of Illinois, } SS.
THIRD GRAND DIVISION,

SUPREME COURT, IN AND FOR THE THIRD GRAND DIVISION OF THE STATE OF ILLINOIS—APRIL TERM, A. D. 1858.

JAMES HAMILTON, *Appellant*, *vs.* PATRICK DUNN, *Appellee*. } PETITION FOR MECHANIC'S LIEN. APPEAL FROM COOK.

MYRON C. PARSONS, *Solicitor for Appellant.*

ELLIOT ANTHONY, *Solicitor for Appellee.*

ABSTRACT OF THE RECORD.

1 The plaintiff in the Court below filed his petition therein, on the twenty-second day of December, A. D. 1857.

2 PETITION.

OF THE JANUARY VACATION TERM OF THE COOK COUNTY COURT OF COMMON PLEAS, A. D. 1857.

2 *To the Honorable John M. Wilson, Judge, etc.:*

IN CHANCERY SITTING.

STATE OF ILLINOIS, COOK COUNTY. } SS.

The Petition avers:

2 1st. That on the fourth day of November, A. D. 1857, the appellee
3 agreed in writing with the appellant to do all plastering, and furnish all materials and labor requisite for plastering appellant's house, which agreement is annexed to petition marked exhibit "A."

3 2nd. That on the fifth day of November, A. D. 1857, the appellee
4 commenced work under the agreement, furnished material, provided men, and put on laths and one coat of mortar, in all respects as provided in the agreement, so far as the work was done.

4 3d. That the appellee performed the work as fast as weather and men would permit, and would have completed the same as specified in the
5 agreement, had he not been delayed by cold weather, and prevented by the appellant from so doing.

5 4th. That the appellee continued the work until about the 13th or 14th day of November, when he was hindered from prosecuting the work

by cold weather, and by the appellant and persons in his employ, who did not finish the carpenter's work as agreed, and that about this time, the
6 appellee was driven away from the premises by the appellant.

6 5th. That appellee resumed and continued work until about the second day of December, A. D. 1857, when he was ejected from the premises by the appellant, and prevented from prosecuting the work, though ready, and offering to complete it, in all respects as provided in the contract.

6 6th. That at the time when the appellee was ejected from the premises, he had finished the first coat of plastering in all respects as agreed, "and "that there is now due to your petitioner (appellee) from the said James "Hamilton (appellant) for material furnished and used in the house of "the said Hamilton, situate on the premises above described, and for "work and labor done and performed on said premises in accordance with
7 "the agreement made by and between your petitioner and the said James "Hamilton, the sum of two hundred dollars."

7 "Your petitioner further sheweth that by reason of the refusal of the "said Hamilton to perform his part of the said agreement according to the "terms thereof, and by reason of the said Hamilton preventing your peti-"tioner from performing the said agreement on his part, that he has "suffered great damages, to wit, the sum of two hundred dollars."

7 "Wherefore your petitioner prays judgment against the said James "Hamilton for the amount so due to your petitioner, and that the said "judgment may be a lien upon the premises hereinbefore described, with "the said house thereon, pursuant to the statute in such case made and "provided," and for general relief.

Words in quotation marks copied from petition verbatim.

7 The agreement marked exhibit "A," provides that the appellee shall
8 do all plastering and furnish all labor and material requisite for plastering the appellant's house.

That he shall put on one good coat of mortar, good laths, with two good coats of whitewash, for twenty cents per square yard; also two coats, the last a hard finish, for twenty-four cents per square yard.

The appellant to direct in writing what portion to be hard finish. First coat to be put on before the fourteenth day of November, A. D. 1857. Last coats before the twenty-fifth day of November, A. D. 1857.

The appellant not to allow delay on his part to retard the work. "The said work is to be finished in the best and most workmanlike manner, and
9 when finished, to be subject to the approval of a competent architect."

The appellant to pay for work as follows: one-eighth of whole amount when first coat is completed, one-eighth of balance when entire work is completed, and the balance in one hundred and twenty days after completion of work. Work to be done as fast as men and weather will permit, and to be commenced on the fifth day of November, A. D. 1857. Words in quotation marks above are copied verbatim from agreement.

10 Process issued returnable to January Vacation Term, A. D. 1858.
11 Served on the appellant the twenty-third day of December, A. D. 1857.

11 On the thirteenth day of February, A. D. 1858, the appellant appeared and filed the following Affidavit:

12 "COOK COUNTY COURT OF COMMON PLEAS.

FEBRUARY TERM, A. D. 1858."

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

"JAMES HAMILTON, } PETITION FOR MECHANIC'S LIEN."
ats.
PATRICK DUNN."

"James Hamilton personally appears, and being first duly sworn, "deposes and says that he is the defendant in the above entitled suit; that "he is well acquainted with, and has, for some months last past, well "known the said Patrick Dunn, the plaintiff in said suit, both personally "and by reputation. That the said Patrick Dunn, according to his own "statements and admissions made to this affiant on or about the first day "of December last past, was, and according to the best of his, this affiant's, "knowledge, information and belief, still is, utterly insolvent, and has no "goods, estate or effects liable to execution, wherefrom such costs, or any "part thereof, as the said Patrick Dunn may be decreed or adjudged to "pay in the above entitled cause, can be made, levied or satisfied. This "affiant further says that he has, as he is informed by his counsel and "verily believes, a good, full and sufficient defence to the above entitled "suit on the merits thereof, and that his proceedings in this behalf are not "in any manner interposed or intended to delay or retard the trial of the "same. This affiant therefore prays that a rule may be entered in the
13 "above entitled cause, requiring the said Patrick Dunn within such time as "the Court, in its discretion, shall see fit, to file good and sufficient security "for such costs as may accrue therein, and in default thereof, that said suit "may be dismissed, according to the form, force and effect of the statute in "such case made and provided."

The foregoing affidavit is copied verbatim from the record.

14 The appellant moved for security for costs, on the foregoing affidavit, on the thirteenth day of February, A. D. 1858.

14 On the twenty-fifth day of February, A. D. 1858, the appellee filed the following Affidavit:

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

14 "Patrick Dunn, of said County, being duly sworn, deposes and says "that he is a mason by trade, and that James Hamilton, the defendant in
15 "this suit, is justly indebted to this deponent in a large sum of money, to "wit, the sum of about two hundred dollars, for work, labor and services "done and performed by this deponent for said Hamilton, and that said "suit herein was commenced against said Hamilton to recover said sum of "money, that this deponent is not insolvent although a poor man, and that "if said Hamilton would pay this deponent what is justly his due, he could "pay all the debts he owes in the world. This deponent further says that "he does not know what the costs of the Court in his case may be, but that "if they do not amount to a large sum of money, he will be able to pay "them without difficulty, especially if said Hamilton pays him what is now

"justly his due. This deponent further saith that he is now and has been "for about a year a resident of the City of Chicago, and that he has no "other residence whatever. And further this deponent saith not."

Words in quotation marks copied verbatim from the record.

16 On the twenty-sixth day of February, A. D. 1858, the Court overruled the motion for security for costs, the cause having been then called for trial, and granted motion of appellee that petition be taken pro confesso, for want of answer, and that a jury be forthwith impanelled to assess the damages. Overruled appellant's cross-motion for leave to file his answer instanter.

17 On same day, cause submitted to the jury, who returned their verdict on the twenty-seventh day of February, A. D. 1858, and assessed the appellee's damages at one hundred and ninety-four dollars.

17 On the twenty-seventh day of February, A. D. 1858, the appellant
18 moved to set aside the default, assessment of damages, and for leave to file his answer. Motion overruled, and decree rendered for appellee.

18 Appeal prayed by appellant.

19 Leave given to file bond in ten days from the twenty-seventh of February, A. D. 1858. Leave to file exceptions till the fifteenth day of March, A. D. 1858. Bond filed on the sixth day of March, A. D. 1858.

21 On the thirteenth day of March, A. D. 1858, leave to file exceptions extended to the twenty-second day of March instant.

22 On the twentieth day of March, bill of exceptions filed.

22 EXCEPTIONS.

26 1st. That "the said Court, upon hearing the foregoing affidavits read, "there being no other or further evidence adduced by the said parties to "support or resist said motion" (motion for security for costs), then and "there overruled the same," etc. Verbatim from the record.

26 2nd. That the Court granted appellee's motion for a decree pro confesso, and overruled appellant's cross-motion for leave to file his answer instanter.

27 3d. That the Court overruled the motion of the appellant to set aside the assessment of the jury, and the decree pro confesso, and for leave to file his answer.

27 4th. That the Court overruled the motion of the appellant to set aside assessment of the jury.

State of Illinois }
Third Grand Division } ss..

{ Supreme Court, in and for the Third Grand Division of the State of Illinois, — April Term A.D. 1858.

James Hamilton
Appellant.
vs. } Appeal.
Patric Dunn
Appellee.

Afterwards, to wit, on the first Thursday in this same term, before the Judges of the Supreme Court of the People of the State of Illinois, at the Court House in the City of Ottawa, comes the said James Hamilton, by Myron C. Parsons his Attorney and says, that in the record and proceedings aforesaid and also in rendering the decree aforesaid there is manifest error in this, to wit:

First: That the motion for security for costs, by the said James Hamilton in that behalf made, was overruled.

Second: That the motion for a decree pro confesso, by the said Patric Dunn in that behalf made, was granted.

Third: That the cross-motion for leave to file his answer instanter by the said James Hamilton in that behalf made, was overruled

Fourth: That the motion to set aside the assessment of the jury, and the decree pro confesso, and for leave to file his answer, by the said James Hamilton in that behalf made, was overruled.

Fifth: That the motion to set aside the assessment of the jury, by the said James Hamilton in that behalf made, was overruled.

Sixth: That the petition aforesaid and the matters therein contained are not sufficient in law for the said Patric Dunn to have or maintain his aforesaid action thereof against the said James Hamilton

Seventh: That the petition aforesaid and the matters therein contained, do not entitle the said Patric Dunn to any such relief as therein is prayed.

Eighth: That by the record aforesaid it appears that the decree aforesaid, in form aforesaid rendered, was rendered for the said Patric Dunn against the said James Hamilton, whereas by the law of the land the said decree ought to have been rendered for the said James Hamilton, against the said Patric Dunn.

And the said James Hamilton prays, that the decree aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed and annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion thereof etc —

Myron B. Parsons
Atty for Appellant.

[12776-29]

77 — 21 8511

Cancillor

vs

Dunn

Abstract

Filed Apr. 22, 1858
S. Leland
Clerk

Refiled May 12, 1858
S. Leland
Clerk

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, A.D. 1859.

JAMES HAMILTON,
vs.
PATRICK DUNN. } *Appeal from Cook Common Please.*

POINTS FOR APPELLANT.

The points I make in this case are:

I.

That the affidavits showed a state of facts which entitled the defendant below to security for costs.

The statute has authorized—indeed requires the court to order such complainants as Dunn to give security for costs.

Cooke Stat., p. 244, Sec. 2.

II.

Upon determining this preliminary question, the defendant below had a legal right to file his answer, which he *immediately* offered to do, and to make his defence to the complaint.

See Cooke Stat., p. 140–1, Secs. 15, 18, 22, 34.

I shall not attempt to hunt up authorities upon a proposition so plain. Indeed, I doubt whether an authority can be found; for, I confess that the annals of civil jurisprudence have not a parallel case of a court's having flatly and simply denied a party a right to make a defence to a suit where he was not in default as to time, but was, and had been, diligently pressing his equitable rights.

I am as much at a loss to find out any justice in this proceeding as I am to see the motive that prompted the denial of defendant's right.

W. B. SCATES, for Appellant.

77-219

Hamilton vs Dunn

" "

Appellants Brief

Filed May 16, 1859

S. D. Leland

Clerk

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Clerk of the ~~Winnebago~~ Cook County Court Court of Common Pleas Court for the County of Cook Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Cook County Court of Common Pleas Court of Cook County, before the Judge thereof, between Patrick Dunn

plaintiff, and James Hamilton

defendant, it is said manifest error hath intervened, to the injury of the aforesaid ~~Pa~~ James Hamilton

as we are informed by his complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 13th day of May in the Year of Our Lord one thousand eight hundred and fifty-eight

L. Leland

Clerk of the Supreme Court.

By J. B. Rice Deputy

[12770-37]

341

James Hamilton
vs
Patrick Dunn

Writ of Error

This writ of Error is made a Supersedeas & as such is to be obeyed by all concerned

L. Leland Clk
by J. M. Rice Deputy

Filed May 13, 1858
L. Leland
Clk

State of Illinois }
County of Cook } ss.

In the Superior Court
Third Division — Attach.

Before me a Notary Public within and for the City of Chicago County and State aforesaid this day of May 1858 personally appeared John Dunlap who being by me duly sworn on his oath says — That he affiant has as Surety executed with James Hamilton & Patrick Dunn a certain Replevied — Bond in the penalty of Four hundred Dollars; and that he affiant is a resident and householder in the City of Chicago — is owner in fee of real estate in said City worth at least three thousand dollars above ~~all~~ over all incumbrance — That he is also owner of four frame houses in said City worth Six hundred dollars each — that affiant has been until recently an Acting Justice of the Peace in said City, though not now engaged in active business. And further saith not.

John Dunlap

Sworn to and subscribed before me this day and year aforesaid — In testimony whereof I have hereunto set my hand and affixed my Notarial Seal at Chicago the day and year aforesaid.

J. Newton Thompson
Notary Public

[12770-32]

State of Illinois, } SS.
THIRD GRAND DIVISION,

SUPREME COURT, IN AND FOR THE THIRD GRAND DIVISION OF THE STATE OF ILLINOIS—APRIL TERM, A. D. 1858.

JAMES HAMILTON, *Appellant*, *vs.* PATRICK DUNN, *Appellee*. } PETITION FOR MECHANIC'S LIEN. APPEAL FROM COOK.

MYRON C. PARSONS, *Solicitor for Appellant.*

ELLIOT ANTHONY, *Solicitor for Appellee.*

ABSTRACT OF THE RECORD.

1 The plaintiff in the Court below filed his petition therein, on the twenty-second day of December, A. D. 1857.

2 PETITION.

OF THE JANUARY VACATION TERM OF THE COOK COUNTY COURT OF COMMON PLEAS, A. D. 1857.

2 *To the Honorable John M. Wilson, Judge, etc.:*

IN CHANCERY SITTING.

STATE OF ILLINOIS, COOK COUNTY. } SS.

The Petition avers:

2 1st. That on the fourth day of November, A. D. 1857, the appellee
3 agreed in writing with the appellant to do all plastering, and furnish all materials and labor requisite for plastering appellant's house, which agreement is annexed to petition marked exhibit "A."

3 2nd. That on the fifth day of November, A. D. 1857, the appellee
4 commenced work under the agreement, furnished material, provided men, and put on laths and one coat of mortar, in all respects as provided in the agreement, so far as the work was done.

4 3d. That the appellee performed the work as fast as weather and men would permit, and would have completed the same as specified in the
5 agreement, had he not been delayed by cold weather, and prevented by the appellant from so doing.

5 4th. That the appellee continued the work until about the 13th or 14th day of November, when he was hindered from prosecuting the work

by cold weather, and by the appellant and persons in his employ, who did not finish the carpenter's work as agreed, and that about this time, the
6 appellee was driven away from the premises by the appellant.

6 5th. That appellee resumed and continued work until about the second day of December, A. D. 1857, when he was ejected from the premises by the appellant, and prevented from prosecuting the work, though ready, and offering to complete it, in all respects as provided in the contract.

6 6th. That at the time when the appellee was ejected from the premises, he had finished the first coat of plastering in all respects as agreed, "and "that there is now due to your petitioner (appellee) from the said James "Hamilton (appellant) for material furnished and used in the house of "the said Hamilton, situate on the premises above described, and for "work and labor done and performed on said premises in accordance with
7 "the agreement made by and between your petitioner and the said James "Hamilton, the sum of two hundred dollars."

7 "Your petitioner further sheweth that by reason of the refusal of the "said Hamilton to perform his part of the said agreement according to the "terms thereof, and by reason of the said Hamilton preventing your peti-"tioner from performing the said agreement on his part, that he has "suffered great damages, to wit, the sum of two hundred dollars."

7 "Wherefore your petitioner prays judgment against the said James "Hamilton for the amount so due to your petitioner, and that the said "judgment may be a lien upon the premises hereinbefore described, with "the said house thereon, pursuant to the statute in such case made and "provided," and for general relief.

Words in quotation marks copied from petition verbatim.

7 The agreement marked exhibit "A," provides that the appellee shall
8 do all plastering and furnish all labor and material requisite for plastering the appellant's house.

That he shall put on one good coat of mortar, good laths, with two good coats of whitewash, for twenty cents per square yard; also two coats, the last a hard finish, for twenty-four cents per square yard.

The appellant to direct in writing what portion to be hard finish. First coat to be put on before the fourteenth day of November, A. D. 1857. Last coats before the twenty-fifth day of November, A. D. 1857.

The appellant not to allow delay on his part to retard the work. "The said work is to be finished in the best and most workmanlike manner, and
9 when finished, to be subject to the approval of a competent architect."

The appellant to pay for work as follows: one-eighth of whole amount when first coat is completed, one-eighth of balance when entire work is completed, and the balance in one hundred and twenty days after completion of work. Work to be done as fast as men and weather will permit, and to be commenced on the fifth day of November, A. D. 1857. Words in quotation marks above are copied verbatim from agreement.

10 Process issued returnable to January Vacation Term, A. D. 1858.
11 Served on the appellant the twenty-third day of December, A. D. 1857.

11 On the thirteenth day of February, A. D. 1858, the appellant appeared and filed the following Affidavit:

12 "COOK COUNTY COURT OF COMMON PLEAS,
FEBRUARY TERM, A. D. 1858."

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

"JAMES HAMILTON, } PETITION FOR MECHANIC'S LIEN."
ats.
PATRICK DUNN."

"James Hamilton personally appears, and being first duly sworn, "deposes and says that he is the defendant in the above entitled suit; that "he is well acquainted with, and has, for some months last past, well "known the said Patrick Dunn, the plaintiff in said suit, both personally "and by reputation. That the said Patrick Dunn, according to his own "statements and admissions made to this affiant on or about the first day "of December last past, was, and according to the best of his, this affiant's, "knowledge, information and belief, still is, utterly insolvent, and has no "goods, estate or effects liable to execution, wherefrom such costs, or any "part thereof, as the said Patrick Dunn may be decreed or adjudged to "pay in the above entitled cause, can be made, levied or satisfied. This "affiant further says that he has, as he is informed by his counsel and "verily believes, a good, full and sufficient defence to the above entitled "suit on the merits thereof, and that his proceedings in this behalf are not "in any manner interposed or intended to delay or retard the trial of the "same. This affiant therefore prays that a rule may be entered in the
13 "above entitled cause, requiring the said Patrick Dunn within such time as "the Court, in its discretion, shall see fit, to file good and sufficient security "for such costs as may accrue therein, and in default thereof, that said suit "may be dismissed, according to the form, force and effect of the statute in "such case made and provided."

The foregoing affidavit is copied verbatim from the record.

14 The appellant moved for security for costs, on the foregoing affidavit, on the thirteenth day of February, A. D. 1858.

14 On the twenty-fifth day of February, A. D. 1858, the appellee filed the following Affidavit:

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

14 "Patrick Dunn, of said County, being duly sworn, deposes and says "that he is a mason by trade, and that James Hamilton, the defendant in
15 "this suit, is justly indebted to this deponent in a large sum of money, to "wit, the sum of about two hundred dollars, for work, labor and services "done and performed by this deponent for said Hamilton, and that said "suit herein was commenced against said Hamilton to recover said sum of "money, that this deponent is not insolvent although a poor man, and that "if said Hamilton would pay this deponent what is justly his due, he could "pay all the debts he owes in the world. This deponent further says that "he does not know what the costs of the Court in his case may be, but that "if they do not amount to a large sum of money, he will be able to pay "them without difficulty, especially if said Hamilton pays him what is now

"justly his due. This deponent further saith that he is now and has been "for about a year a resident of the City of Chicago, and that he has no "other residence whatever. And further this deponent saith not."

Words in quotation marks copied verbatim from the record.

16 On the twenty-sixth day of February, A. D. 1858, the Court overruled the motion for security for costs, the cause having been then called for trial, and granted motion of appellee that petition be taken pro confesso, for want of answer, and that a jury be forthwith impanelled to assess the damages. Overruled appellant's cross-motion for leave to file his answer instanter.

17 On same day, cause submitted to the jury, who returned their verdict on the twenty-seventh day of February, A. D. 1858, and assessed the appellee's damages at one hundred and ninety-four dollars.

17 On the twenty-seventh day of February, A. D. 1858, the appellant
18 moved to set aside the default, assessment of damages, and for leave to file his answer. Motion overruled, and decree rendered for appellee.

18 Appeal prayed by appellant.

19 Leave given to file bond in ten days from the twenty-seventh of February, A. D. 1858. Leave to file exceptions till the fifteenth day of March, A. D. 1858. Bond filed on the sixth day of March, A. D. 1858.

21 On the thirteenth day of March, A. D. 1858, leave to file exceptions extended to the twenty-second day of March instant.

22 On the twentieth day of March, bill of exceptions filed.

22 EXCEPTIONS.

26 1st. That "the said Court, upon hearing the foregoing affidavits read, "there being no other or further evidence adduced by the said parties to "support or resist said motion" (motion for security for costs), then and "there overruled the same," etc. Verbatim from the record.

26 2nd. That the Court granted appellee's motion for a decree pro confesso, and overruled appellant's cross-motion for leave to file his answer instanter.

27 3d. That the Court overruled the motion of the appellant to set aside the assessment of the jury, and the decree pro confesso, and for leave to file his answer.

27 4th. That the Court overruled the motion of the appellant to set aside assessment of the jury.

341

James Hamilton
vs
Patrick Dunn

Aff. dat. of justice

Filed May 13. 1858
L. Leland
Clk.

State of Illinois }
Third Grand Division } ss..

{ Supreme Court, in and for the Third Grand Division of the State of Illinois. — April Term A.D. 1858

James Hamilton
Appellant.
vs.
Patrick Dunn
Appellee

Afterwards, to wit, on the first Thursday in this same term, before the Judges of the Supreme Court of the People of the State of Illinois, at the Court House in the City of Ottawa, comes the said James Hamilton, by Myron B. Parsons his Attorney, and says, that in the record and proceedings aforesaid, and also in rendering the decree aforesaid, there is manifest error in this, to wit:

First: That the motion for security for costs, by the said James Hamilton in that behalf made, was overruled.

Second: That the motion for a decree pro confesso, by the said Patrick Dunn in that behalf made, was granted.

Third: That the cross-motion for leave to file his answer instanter, by the said James Hamilton in that behalf made, was overruled.

[1270-98]

Fourth: That the motion to set aside the assessment of the jury, and the decree pro confesso and for leave to file his answer, by the said James Hamilton in that behalf made, was overruled.

Fifth: That the motion to set aside the assessment of the jury, by the said James Hamilton in that behalf made, was overruled.

Sixth: That the petition aforesaid and the matters therein contained, are not sufficient in law for the said Patric Dunn to have or maintain his aforesaid action thereof against the said James Hamilton.

Seventh: That the petition aforesaid and the matters therein contained, do not entitle the said Patric Dunn to any such relief as therein is prayed.

Eighth: That by the record aforesaid it appears that the decree aforesaid, was rendered for the said Patric Dunn against the said James Hamilton whereas by the law of the land, the said decree ought to have been rendered for the said James Hamilton, against the said Patric Dunn. And the said James Hamilton prays that the decree aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed and annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion thereof etc.

Myron C. Parsons
Atty for Appellant.

And now comes the
said appellee by E. Anthony his atty
and says that there is no error
in the Record & proceedings aforesaid
& in the rendition of the judgment
aforesaid & entering of the decree
aforesaid & prays the court
to examine the same & that the same
may be in all things affirmed
&c.

E. Anthony
atty for appellee

Filed April 22, 1855
D. A. Shannon
Clerk

Received Nov 12, 1855
D. A. Shannon
Clerk

Manuel
vs
Duncan

77 Tex 54

Know all Men by These Presents, That we James Hamilton as principal, and John Dunlap as security, are held and firmly bound unto Patrick Dunn in the penal sum of Four Hundred dollars good and lawful money of the United States, for the payment of which, well and truly to be made, the said James Hamilton and John Dunlap bind themselves and their heirs, executors, and administrators, jointly, severally, and firmly by these Presents.

Witness, our hands and seals this 14th day of May A. D. 1858

The Condition of the above Obligation is such, That, whereas, the above named ~~James Hamilton~~ Patrick Dunn did, at the February Term of the Cook County Court of Common Pleas ~~Court~~, held in and for the County of Cook in the State of Illinois, A. D. 1858 recover a judgment against the above bounden James Hamilton for the sum of One Hundred and Ninety Four Dollars ——— to reverse which said judgment, the said James Hamilton has sued out a Writ of Error from the Supreme Court, within and for the Third Grand Division of said State. Now if the said James Hamilton shall duly prosecute said Writ of Error, and pay, or cause to be paid, all judgments, costs, interest and damages which the said Supreme Court shall adjudge against said James Hamilton and abide the order and judgment of said Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.

James Hamilton [SEAL.]

[SEAL.]

John Dunlap [SEAL.]

[SEAL.]

341

James Hamilton
vs
Patrick Dunn

Susp. Bond

Filed May 13. 1858
S. Leland
Clk

Know all Men by These Presents, That we James Hamilton and John Devitt as principal, and as security, are held and firmly bound unto Patrick Dunn in the penal sum of Four hundred dollars good and lawful money of the United States, for the payment of which, well and truly to be made, the said James Hamilton and John Devitt, bind themselves and their heirs, executors, and administrators, jointly, severally, and firmly by these Presents.

Witness, our hands & seals

this 23d day of May A. D. 1859

The Condition of the above Obligation is such, That, whereas, the above named Patrick Dunn did, at the February Term of the Cook County Court of Common Pleas ~~Court~~, held in and for the County of Cook in the State of Illinois, A. D. 1859 recover a judgment against the above bounden James Hamilton for the sum of one hundred & ninety four dollars to reverse which said judgment, the said James Hamilton has sued out a Writ of Error from the Supreme Court, within and for the Third Grand Division of said State. Now if the said James Hamilton shall duly prosecute said Writ of Error, and pay, or cause to be paid, the amount of said judgment and all judgments, costs, interest and damages which the said Supreme Court shall adjudge against said James Hamilton and abide the order and judgment of said Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.

James Hamilton [SEAL.]
John Devitt [SEAL.]
[SEAL.]
[SEAL.]

{12770-41}

State of Illinois } In Supreme Court
Cook County } April Term 1859.
City of Chicago }

Before me a Notary Public within and for the City of Chicago - County and State aforesaid - this 23d day of May 1859. Came John Devitt who being duly sworn deposes & says that he has signed as surety the bond of James Hamilton in the case of Hamilton v Dunn in the Supreme Court - that he is a resident of said City of Chicago - and that he is worth in property liable to execution, the sum of four hundred dollars over & above all his debts & further saith not

Sworn to & subscribed the day & date above.

John Devitt

S. G. Bingham
Notary Public

77

James Hamilton

vs

Patrick Dunn

Bond on Super-
Sedeas

Filed May 26. 1859
L. Leland
Clerk

must be filed by 24th
inst in Supreme Court

Supreme Court - Third Grand
Division. April T. 1859.

James Hamilton Appellant
vs
Patrick Dunn Appellee

State of Illinois
La Salle Co } ss. Elliott Anthony of the county of Cook & State of Illinois being duly sworn deposes & says that he is well acquainted with James Hamilton the appellant in this case - and also with John Dunlap - This deponent further saith that it appears by records in this case that said James Hamilton & John Dunlap signed the supersedeas bond in this case - This deponent further saith that he believes that said James Hamilton & John Dunlap are utterly worthless and insolvent. This deponent further saith John Dunlap has not as this deponent believes any goods chattels lands or effects of any description at the present time belonging to

[12770-13]

him except what the law might barely allow him - that he has for more than a year been notoriously insolvent & is at the present time a defaulter to a large amount of the public revenue as collector of North Chicago - that this deponent knows personally that such is the fact as appears by the books now the county Treasurer's office in Cook county - This deponent further saith that he does not believe that a judgment of Ten cents could be collected from him at the present time -

This deponent therefore prays that the said appellant file further security for his case - at once

E. Anthony

Subscribed & sworn to before me this 7th day of May 1859

L. Leland Clerk of Supreme Court.
by J. B. Rice Deputy