

No. 13111

# Supreme Court of Illinois

Reisig

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vs.

Burkhart

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71641  7

STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

No. 211.

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Reichard

~~Reisig~~  
vs

Burnard

---

Reisig  
vs  
Burkhart



United States of America. }  
State of Illinois, Cook County } ss.

Read before the Honorable the Judges of the  
Superior Court of Chicago in the County of  
Cook and State of Illinois at a regular  
term of said Superior Court begun and holden  
at the Court House in the City of Chicago, in  
said County and State aforesaid on the first  
Monday being the second day of January  
in the year of our Lord one thousand eight  
hundred and sixty and of the Independence  
of the United States of America the Eighty  
fourth.

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Present. The Hon: John M. Wilson . . Chief Justice  
of Superior Court of Chicago.  
Wm H. Higgins and Grant Goodrich, Judges  
Carlos Hawen . . . . Prosecuting Attorneys  
John Gray . . . Sheriff of Cook County

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Officer,

Walter Kimball. Clerk.



Be it remembered that heretofore to wit on the Tenth day of May  
in the year of our Lord one thousand eight hundred and fifty  
eight, came Charles Reissig by his Attorneys and filed in the  
Office of the Clerk of the Cook County Court of Common Pleas  
his certain Receipt and Petition for Mechanics Lien: Which said  
Receipt & Petition is in words and figures following, to wit.

"Book to: bet to: Pleas.

Charles Reissig

vs

William Buckhart, Frederick  
Buckhart, William B. Ogden  
& Frederick Markes

Petition for  
Mechanics Lien.

Please issue a Summons in the  
cause according to prayer of Petition. Ret: to June Term.  
Halter Kimball }  
Clerk " }  
Coventry. Rountree & Vaughan  
Plffs Atys."

" To the Hon: John M. Nelson Judge of the  
Cook County Court of Common Pleas.

Your petitioner Charles Reissig would respectfully represent  
unto this Court that heretofore to wit on the twenty second day  
of April in the year of our Lord one thousand eight hundred and  
fifty seven your petitioner then and now a resident of the City  
Chicago, County of Cook and State of Illinois entered into a  
contract and agreement with William Buckhart and Frederick  
Buckhart; two of the Defendants in this suit, who were partners



and doing business in Chicago, County and State aforesaid under  
the firm, name and style of New and Frederick Buckhart in  
which your Petitioner at the special instance and request of the  
said defendants agreed to furnish said Defendants a Steam Engine  
and Boiler and appurtenances thereto belonging and did furnish  
the same, together with Smokepipe, shafting, hangers, bolts, nuts,  
lead pipe, turning shaft and sheet iron rods and plates and erect  
the same for the said defendants in their frame building situated  
on Lot number sixteen in Block number Forty three in Ogden  
addition to Chicago Ohio the said Defendants in consideration  
thereof promised to pay your Petitioner for the Steam Engine  
and Boiler Ten hundred and ten dollars and twenty five cents in  
manner following, that is to pay, Two hundred dollars at the time of  
the date of said Contract and Two hundred dollars at the time the  
said Engine & Boiler was finished at your Petitioner's Shop in said  
City of Chicago and the balance in four and eight months from the  
time said Engine & Boiler should have been paid for, which period has  
now elapsed and for the said Smokepipes, shafting, hangers and  
other articles enumerated in the Bill of particulars hereto annexed  
and which your Petitioner prays may be made a part of this  
Petition, the said Defendants were to pay your Petitioner so much as  
they were reasonably worth and at the price in said Bill noticed

That there is now due and owing your Petitioner from the said  
Defendants William Buckhart and Frederick Buckhart upon said  
respective contract the sum to wit, the sum of Five hundred and  
fourteen dollars and thirty seven cents together with the interest  
thereon and six Months has not elapsed, since the last payment  
upon said contract and for said articles was to be made



And your Petitioner further says that he is informed and believes that William B. Ogden, Frederick Markus, Caleb C. Halsted, have or claim some interest in said premises either as Mortgages, members or otherwise and therefore prays they be made parties to these proceedings pursuant to the Statute in such case made and provided

Therefore your Petitioner prays the usual process of this Court in the premises and that his Lien may hereby be preserved to him and that judgment may hereby be pronounced rendered against said premises and the materials so furnished, for the said sum of Three hundred & fourteen dollars and thirty seven cents and interest thereon and that the said William B. Ogden, Frederick Markus, Caleb C. Halsted may be forever barred and foreclosed of their interest therein, and that your Petitioner may have such other and further relief as he may be entitled to under the Statute in such case made and provided

Boventry, Rountree & Vaughan  
Attys for Petitioner."

Copy of Contract

Articles of Agreement made and entered into this Twenty second day of April 1857 Between Charles Kissig of Chicago 1st party of the first part and William & Frederick Buckhart of the same place, 2nd party of the first part to wit,

The party of the first part agrees to build for the party of the second part one upright Steam Engine of seven inch bore and



include with photo with a boiler 30 inches diameter, ten feet  
 long with 24 pieces plus 3 inches diameter, also fire front and  
 grate bars for same and all the necessary pipes to connect said  
 Engine with said Boiler. And said party of the first part to  
 further agree to make the Bed Plate for the engine, large  
 enough to receive a second cylinder when wanted.

In consideration of the above the party of the second part  
 agrees to pay the party of the first part the sum of One thousand  
 and two <sup>25</sup>/<sub>100</sub> dollars in manner following, Two hundred dollars on  
 signing this agreement. Two hundred dollars when the work is  
 finished at C. Reising's shop - balance in four and eight months  
 from the time it leaves the shop received by the order of the  
 party of the second part. The party of the first part hereby agrees  
 to have the work complete in three weeks from date and furnish  
 one man to set up the frame in the City of Chicago.

Witness our hands and seals the day and year first above  
 written.

In presence of  
B. Smith

Charles Reising (Seal)

Wm & Frederick Buckhart (Seal)

### Copy of Account.

Chicago November 17/54

Messrs Wm & Frederick Buckhart

To Charles Reising. Dr

|        |                              |       |         |
|--------|------------------------------|-------|---------|
| May 21 | To 658 lbs Smelt pipe        | @ 9.  | \$59.22 |
| " 21.  | " 1 Engine & Boiler          | 1010  | " 25    |
| " "    | " Shafting Hangers & 928 lbs | @ 10. | 92.80   |
| " "    | " 39 lbs Bolts & Nuts        | @ 10  | 3.90    |



|         |    |         |                            |      |       |                  |
|---------|----|---------|----------------------------|------|-------|------------------|
| May, 24 | 30 | 611 lbs | Braxes for Smoke pipe      | @ 9  | .. \$ | 11. 86           |
| "       | 30 | "       | 8 feet Lead pipe           |      |       | 2. 90            |
| June 1  | "  | 611 lbs | Shafting & Flanges         | @ 10 |       | 6. 40            |
| "       | 6  | "       | 1 Steel Iron Rod 18 1/2 in | @ 10 |       | 18. 40           |
| "       | 1  | "       | 1 Steam Gauge & Pipe       |      |       | 29. 00           |
| "       | 15 | "       | Turning Shaft              |      |       | 1. 00            |
|         |    |         |                            |      |       | <hr/> \$1228. 43 |

And thereupon accordingly on the said tenth day of May A.D. Eighteen hundred and fifty eight there issued out of and under the seal of said Court Peoples Writ of Summons in word and figures following, to wit,

' State of Illinois )  
County of Cook } ss.

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

We command you that you summon William Buckhart, Frederick Buckhart, William B. Copeland & Franklin Markus, if they shall be found in your County, personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the Special Term thereof, to be holden at the Court House in the city of Chicago in said County on the second Tuesday of June next to answer unto Charles Riesig in his certain Petition for Mechanics Lien filed in said Court.

And have you then and there this Writ with an endorsed return thereon in what manner you shall have executed the same Witness Walter Kimball, Clerk of our said Court, and



This Seal thereof at the City of Chicago in said County this 10<sup>th</sup>  
day of May A. D. 1858.

(Seal) (Endorsed)

Walter Kimball. Clerk "

" Served by delivering a copy of the within to  
Wm Buckhart & Fred Buckhart May 28<sup>th</sup> 1858. The others  
not found in my County.

John L. Wilson. Sheriff

By Seth Taylor - Deputy "

That hereafter to wit on the seventeenth day of June  
A. D. eighteen hundred and fifty eight, there issued out of and  
under the seal of said Court People's Writ of Summons (alias)  
in words and figures following to wit -

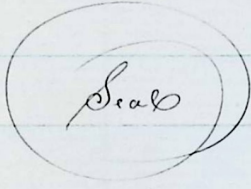
" State of Illinois  
County of Cook } &c.

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

11. We command you, as we have before commanded that  
you summon William Buckhart, Frederick Buckhart, William  
B. Ogden and Frederick Markus if they shall be found in  
your County personally to be and appear before the Cook County  
Court of Common Pleas of said County on the first day of the  
next term thereof, to be held at the Court House in the City of  
Chicago, in said County on the first Monday of July next to  
answer unto Charles Reising in his certain Petition for Writ of  
Quia Secus in said Court - That have you there and there



this writ, with an endorsement 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 14<sup>th</sup> day of  
June A. D. 1858.

Walter Kimball Clerk.

(Endorsement)

"Served on Frederick Markus by delivering a  
copy thereof to him - June 25<sup>th</sup> 1858.

John S. Wilson Sheriff

By Seth Taylor - Deputy."

And thereafter to wit on the 5<sup>th</sup> day of July A. D.  
Eighteen hundred and fifty eight the said Defendants filed in the  
Office of the clerk of said Court their Demurrer to said Petition in  
words and figures as follows, to wit:



State of Illinois - Cook County Court of  
Common Pleas

18 William Buekhoutlat of the July Term 1858  
vs  
Charles Rusing In Chancery

The Demurrer of William  
Buekhout, Frederick Buekhout William B. Ogden  
& Frederick Marcis Defendants to the Petition of  
Charles Rusing Petitioner -

These defendants by protestation not  
confessing or acknowledging all or any of the matters  
& things in the said Petition contained to be true in  
such manner & form as the same are therein & thereby  
set forth & alleged do demur to the said Petition  
& for cause of demurrer shew -

That the said Petition  
& the matters & things therein contained in manner &  
form as the same are above stated & set forth are  
not sufficient in law for the said Petitioner to have  
or maintain his lien aforesaid upon said premises.

1st For that it doth not appear by said Petition that  
the Contract therein set forth was made with the owner  
(within the meaning of the Statute in such case made &  
provided) of said premises upon which the lien is  
prayed

2nd It doth not by said Petition appear that any  
Contract was made to erect said Engine &c on said



land or lot

3<sup>rd</sup> It doth not state & set forth any contract within the meaning & purview of the Statute.

4<sup>th</sup> It doth not appear that said Petitioner furnished "labor or materials for erecting or repairing any building or the appurtenances of any building" on said land or lot.

5<sup>th</sup> The case made by said Petition doth not meet the requirements of the Statute.

6<sup>th</sup> For that the said Petition is in other respects uncertain, informal & insufficient.

Wherefore the Defendants do demand to said Petition & they pray the judgment of this Honorable Court whether they or either of them shall be compelled to make any further or other answer thereto & they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

C. R. M. Gall  
Rtts Soli



And afterwards to wit on the eighth day of December (being one of the days of the November Special Term of said Court) A.D. Eighteen hundred and fifty eight, the following, among other, proceedings were had and entered of record in said Court, to wit:

Charles Keisig . . . . .

(vs)

William Buckhart, Frederick  
Buckhart, William, B. Ogden  
and Frederick Markus . . . . .

Petition for

Mechanics Lien.

This day comes the said Petitioner by Courtney, Rumree & Vaughan his Solicitors and the said Defendants by Tule their Attorney also come and counsel being heard on the demurrer of the said Defendants herein pleaded to said Petitioners Petition in this cause and due deliberation being thereupon had and the premises fully understood it appears to the Court that said demurrer is not sufficient in law to bar the said Petitioner from having and maintaining his suit against the said Defendants the Demurrer is therefore overruled, with leave to said Defendants to plead over, and they electing to stand by their said Demurrer, On Motion it is ordered said Defendants do plead, answer or demur over instant, and no answer being interposed and they being three times severally solemnly called in open Court, and failing to appear, It is ordered that said Petitioners Petition in this cause be taken as confessed against the said Defendants for want of answer.



And afterwards to wit on the Ninth day of December (being  
15<sup>th</sup> 1881) of the said November Special Term of said Court) A.D.  
Eighteen hundred and fifty eight the following proceedings were  
had in said Court and entered of record in said Court, to wit

Charles Reising

(vs)

William Buckhart, Frederick  
Buckhart, William B. Ogden  
and Frederick Markus

Petition for Mechanics Lien

Decree.

This cause having been brought on to  
be heard upon the Petitioner's Petition taken as confessed by all  
the Defendants and a Jury having been impanelled and cause on  
the part of Petitioner having been submitted to the Jury and verdict  
having been rendered by said Jury, for the Petitioner for the sum  
of Five hundred and thirty one  $77/100$  dollars, for the Machinery and  
Materials constructed furnished and erected by the Petitioner upon the  
premises as described in the Petitioner's Petition. It is hereby ordered  
adjudged and decreed and this Court by virtue of the former and  
authority herein vested with Order adjudged declare and decree that  
the said Petitioner Charles Reising have judgment against the said  
Machinery and materials constructed furnished and erected by said  
Petitioner and against said premises mentioned in said Petition to  
Lot Number Sixteen (16) Block Number Forty Three (43) Against  
Admission to Chicago situate in Cook County Illinois, and that said  
Machinery and Materials and Real Estate be sold to satisfy said  
judgment, and that the said William Buckhart and Frederick



Buckhardt, he foreclosed of all right and equity of redemption of the same, and also persons claiming or to claim said premises from or under them he foreclosed of all right of Equity or redemption of said premises from such Sale.

And thereafter to wit on the Twenty fourth day of March A. D. Eighteen hundred and fifty three again came the said Petitioner and filed in the Office of the Clerk of said Court his Supplemental Petition, in said case, in words and figures, following to wit

In the Cook County Court of Common Pleas  
Of the April Term A. D. 1859.

To the Honorable John M. Wilson, Judge of said Court  
Your Petitioner Charles Kessig of the City of Chicago, State of Illinois, would respectfully show unto your Honor that heretofore to wit on the Tenth day of May in the year of our Lord one thousand eight hundred and fifty eight your Petitioner filed in the Honorable Court his Petition for a Mechanics Lien under the Statute in such case made and provided against William A. Buckhardt, Frederick Buckhardt, William B. Ogden and Frederick Markus for Materials, Steam Engine Mower and the appurtenances thereto belonging made and sold and erected upon the Land and claims as belonging to the said William and Frederick Buckhardt and in which said Land the said William B. Ogden and Frederick Markus claimed some interest equitable or otherwise  
That in answer to said Petition filed as aforesaid, the said Defendants appeared by their Attorney O. R. H. Sull and filed their



Demurrer to said Petition, which said Demurrer being taken under advisement by this Honorable Court was overruled. That said defendants electing to stand by their Demurrer judgment nil dict was rendered by said Court and a Jury having been impanelled there was found due and owing your Petitioner from said William & Frederick Buckhart upon the Contract for making furnishing and erecting said materials upon the premises known as Lot Number Sixteen in Block Number Forty three in Adams Addition to Chicago and belonging to said William & Frederick Buckhart or claimed as belonging to them the sum of Two hundred & thirty one & 77/100 dollars and said Jury returned a Verdict for said amount.

20

Your Petitioner would further show unto your Honor that sometime before the filing of your Petitioners Petition as aforesaid the said William and Frederick Buckhart as your Petitioner is informed and believed and so states the fact to be made an assignment for the benefit of their Creditors of all their Effects real and personal to the said Frederick Markus, and the said Frederick Markus as your Petitioner is informed & believed entered upon the discharge of the trusts thereby created. That your Petitioner filed his said Petition for the obtaining of a Mechanics Lien under the Statute made and provided in such cases within the time required by said Statute to wit within six Months after the time the last payment became due upon the Contract for furnishing and erecting such materials as set forth and fully described in your Petitioners original Petition and to which your Petitioner prays leave to refer. That your Petitioner is informed and upon inquiry so finds the fact to be since the obtaining of

21



22 the said judgment the said Frederick Marcus during the  
pendency of your Petitioner's original suit to enforce his lien sold &  
transferred the Steam Engine and Boiler and the materials and  
appurtenances thereto belonging furnished and erected as aforesaid to  
your Petitioner to some person or persons unknown to your  
Petitioner, who removed the same from off the premises upon which  
they were erected as aforesaid, and out of the Jurisdiction of this  
Honorable Court; And as assignee of said William & Frederick  
Buckhart delivered the same to said person or persons and has  
from them no payment thereof money or securities for the payment  
of money.

23 That said Engine and Boiler Materials and appurtenances  
have been removed from said premises and are not now within  
the reach of process of this Honorable Court to satisfy said  
judgment rendered in favor of your Petitioner as aforesaid.

That as your Petitioner is informed and believes said  
William and Frederick Buckhart had from said William B.  
Ogden a contract for the conveyance of said premises upon  
which said Engine and Boiler Materials and appurtenances were  
erected upon which but one or two payments have been made  
and which said Contract by reason of the failure to pay the  
installments called for, and due by said Contract by said  
William & Frederick Buckhart as your Orator is informed and  
believes is in danger of being forfeited and the interest of said  
William and Frederick Buckhart lost or so limited in extent as to  
be insufficient to satisfy the claims and judgment of your Petitioner.

24 That your Petitioner cannot discover any interest of said  
William and Frederick Buckhart or either of them in said premises.



or any part thereof sufficient or at all within reach of process of the Court to satisfy his said judgment.

25

Now your Petitioner charges that the said Frederick Markus ought to be decreed to pay unto your Petitioner the proceeds derived from the Sale of said Engine and Boiler and the materials and appurtenances furnished supplied and erected as aforesaid and described in the Contract now on file in this cause or in case the said Markus has disposed of the same that he ought to be decreed to pay unto your Petitioner the value thereof or so much of the value thereof as will satisfy your Petitioner's said judgment.

26

To the end therefore that the said Frederick Markus may if he can show why your Petitioner should not have the relief hereby prayed and may upon his Corporate Oath to the best of almost of his knowledge information and belief full true direct and perfect answer make to all and singular the matters aforesaid as fully and explicitly as if the same were here again repeated and he thereto particularly interrogated And more especially that he may answer and set forth whether he was or was not the assignee of said William P. Frederick Buckhart under a deed of assignment or otherwise by then made to him during the year A.D. 1857 or A.D. 1858.

26

Whether he did or did not enter upon a discharge of the duties created by such trust?

27

Whether he sold transferred or assigned or in any way disposed of the Steam Engine and Boiler and the materials and appurtenances thereto belonging erected upon Lot number thirteen in Block Number Forty two in Queens Addition to Chicago



and used by the said William and Frederick Buckhart and passed to him by their Assignment?

To whom he sold transferred or assigned or disposed of said Boiler Engine and appurtenances and at what time he sold them?

What price he received for the same and the quality kind and condition of the consideration paid him for such Engine, Boiler and appurtenances?

28

And that your Petitioner may have the same relief against the said Markus as he might have had as if the facts hereinafore stated and charged by your Petitioner by way of Supplement had been stated in your Petitioner's Original Petition. And in case the said Markus shall answer he has not the proceeds of the sale or transfer of said Engine & Boiler and appurtenances as aforesaid in his possession then that he may be decreed to pay to your Petitioner the amount of said judgment so obtained by your Petitioner as aforesaid or so much thereof as the amount derived from the Sale of said Engine Boiler and appurtenances or the value of the proceeds of such Sale will pay and discharge. And that your Petitioner may have such other and further relief in the Premises as the circumstances of his case may require And to your Honor shall seem meet.

29

May it please your Honor to grant unto your Petitioner the Writ of Summons issuing out of and under the Seal of this Honorable Court to be directed to the said Frederick Markus, commanding him by a certain day and under a certain penalty therein to be inserted to be and appear



before this Honorable Court then and there to answer the same  
and further to stand to and abide by such Order and decree  
therein as shall be agreeable to Equity and good Conscience.

And your Petitioner will ever pray &c.  
County, Pontreac & Vaughan }  
Solo Petitioner. } Charles Weissig "

"State of Illinois }  
County of Cook } ss.

30

Charles Weissig of said County being sworn  
says he is the Petitioner in the foregoing Petition and that he  
has read the same and knows the contents thereof to be true  
except as to such matters and things as are therein stated upon  
information and belief and as to those matters he believes the  
same to be true.

Subscribed and sworn before } Charles Weissig "  
on this 14<sup>th</sup> March A.D. 1859 }  
Walter Kimball - Clerk "

31

And thereupon accordingly on the said <sup>24</sup> twenty fourth  
day of March A.D. Eighteen hundred and fifty nine, Peppes  
Writ of Summons issued out of and under the Seal of said Court  
in words and figures as follows to wit,

"State of Illinois }  
County of Cook } ss.

The People of the State of Illinois To the  
Sheriff of said County greeting



31  
We command you that you summon Frederick Markus  
if he shall be found in your County, personally to be and to  
appear before the Cook County Court of Common Pleas of said  
County of Cook on the first day of the next term thereof to be  
holden at the Court House in the City of Chicago in said  
County on the first Monday of April next to answer unto  
Charles Heising in his certain Supplemental Petition filed in  
the said Court on the Chancery side thereof.

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

Seal.

Witness Walter Kimball Clerk of our said  
Court the seal thereof at the City of Chicago  
aforesaid this 21<sup>st</sup> day of March A.D.  
1859.

Walter Kimball Clerk.

32  
(Endorsement) "Served this writ on the within named Frederick  
Markus by delivering a Copy thereof to him this 25<sup>th</sup> day of  
March 1859.

John Gray. Sheriff

By A. C. Heising Deputy.

33  
And thereafter to wit on the second day of May A.D.  
Eighteen hundred and fifty nine came the said Defendant  
Frederick Markus by his Attorney and filed in the Office of  
the Clerk of said Court his Demurrer to said Supplemental  
Petition in words and figures as follows, to wit.



"In Chancery."

State of Illinois }  
Cook County : }

In the Superior Court of Chicago  
Of June Term 1859.

The Demurrer of Frederick Markus as  
Defendant to the Supplemental Bill of Charles  
Kissig - Complainant.

This defendant by protestation not confessing or acknowledging  
all or any of the matters and things in the said Complainant's  
supplemental Bill contained to be true in such manner and  
form as the same are therein and thereby set forth and alleged  
doth demur to the said Bill and for cause of Demurrer doth  
showeth that the said Complainant has not by his said Bill,  
made such a case as entitles him in a Court of Equity to  
any discovery from this Defendant or to any relief against  
him as to the matters contained in said Bill or any of said  
matters and that any discovery that can be made by this  
Defendant touching the matters complained of in said Bill or  
any of them cannot be of any avail to the said Complainant  
for any of the purposes for which a discovery is sought against  
the Defendant by the said Bill nor entitles the said  
Complainant to any relief in this Court touching any of the  
matters therein complained of. Therefore and for divers other  
good causes of Demurrer appearing in said Bill this Defendant  
doth demur thereto and thus prays the Judgment of this  
Honorable Court whether he shall be compelled to make any further  
or other Answer to the said Bill this humbly prays to be thus  
dismissed with his reasonable costs in this behalf sustained.

By O. R. T. Lee. Def's Solr.



And thereafter to wit on the thirteenth day of May A D  
Eighteen hundred and fifty nine the said Defendant Workless  
filed in the Office of the Clerk of said Court his Special Demurrer  
in said cause, in words and figures following to wit,

"The said defendant shows as Special Causes  
for Demurrer.

1<sup>st</sup> That the Petitioner by the exercise of proper diligence  
might have discovered the facts contained in the said Supplemental  
Bill in time to have used them in the Original suit.

2<sup>d</sup> The Petitioner does not show that any decree was entered  
against said premises in the Original suit.

3<sup>d</sup> It does not appear but that the said Engine & Boiler and  
appurtenances thereto belonging were personal property.

4<sup>th</sup> The Petitioner shows no decree or lien or judgment of any  
kind against said Engine or Boiler or their appurtenances or  
that he has any higher right therein than any other Creditor.

5<sup>th</sup> It does not appear but that the Petitioner might have  
satisfied his demand by proceeding against the  mentioned

6<sup>th</sup> That the Bill is in other respects uncertain  informal  
and insufficient.

B. R. H. Cull.

Defts Atty.

And afterwards to wit on the Nineteenth day of September  
(being one of the days of the September Term of said Court)  
A D Eighteen hundred and fifty nine, the following proceedings  
were had and entered of record in said Court, to wit,



34.

Charles Reising . . . . .

at

William Burkhardt, Frederick

Burkhardt & Co . . . . .

Petition for Mechanics Lien

This day comes said Petitioner by  
 Henry R. R. and Vaughan his Attorneys and said Defendant  
 by C. R. W. Lill his Attorney also come and counsel being  
 heard on the demurrer of said Defendant to Supplemental Petition  
 filed herein by said Petitioner and due deliberation being thereupon  
 had and the premises fully understood; it appears to the Court that  
 said Demurrer is insufficient to bar Petitioner from having and  
 maintaining his action on said Supplemental Petition the demurrer  
 is therefore overruled and thereupon on Motion it is Ordered said  
 Defendants make answer to Petitioner's Supplemental Petition herein  
 by 1st Monday in October next.

35.

Also thereafter to wit on the Twenty fourth day of September  
 A.D. eighteen hundred and fifty nine came the said Defendant  
 Markus by his said Attorney, and filed in the Office of the Clerk  
 of said Court his Answer to said Supplemental Petition in words  
 and figures following, to wit:

" In Chancery

Frederick Marcus

vs

Charles Reising

The Superior Court of Chicago.

May Term 1859.

The Answer of Frederick Markus defendant

36.



to the Supplemental Petition of Charles Kessig, Petitioner.

This defendant reserving to himself all right of exception to the said Supplemental Petition for answer thereto forthwith.

That he admits that on the 10<sup>th</sup> day of May A. D. 1858 the said Petitioner filed a Petition in this Court for a Mechanics Lien as stated in said Supplemental Petition - he also admits that the Defendants appeared and filed their Demurrer to said Petition and that the same was overruled - that a Judgment nisi was rendered against the Defendants and that thereupon came to Court who found that \$531.74 was owing said Petitioner from the said William & Frederick Buckhart for a certain Steam Engine and Boiler & appurtenances thereof before that time sold and delivered by him to the said William & Frederick Buckhart. but this defendant does not recollect that the Petitioner made any claim in said Petition for any "materials" other than the Engine Boiler &c aforesaid - nor is it true that the said Petitioner furnished the said William & Frederick Buckharts "materials" other than as hereinbefore specified that this Defendant denies the said Jury found that the amount aforesaid was due the said Petitioner upon the contract for making furnishing and erecting any materials, or the Engine, Boiler &c aforesaid upon the premises mentioned in said Supplemental Petition, as is therein charged nor did the original Petition herein show any such contract, nor was there ever such a contract in existence - but this defendant admits that there was a contract set forth in said original Petition for selling the said William & Frederick Buckhart a Steam Engine, Boiler & appurtenances thereof, and that upon that the Jury found the amount aforesaid but under



39  
+ That Contract there was only one Note of \$304<sup>37</sup> unpaid under  
the said Contract & no other or greater sum & which is all the  
said Complainant can rightfully claim - and also as to the said  
several items, contained in the Bill of Particulars defendant denies  
that Complainant has by law any lien, and claims the same  
benefit as if he had specifically assumed - but he says that  
instead of being a Contract for the Erection of said Boilers &  
aforesaid upon said Lot, or upon any particular Lot, it was  
for its Erection anywhere in the City of Chicago.

40  
This Defendant further answering says he admits that  
the said William & Frederick Buckhart before the filing of said  
Original Petition made an assignment to this Defendant of all  
their Effects including all of their real and personal property,  
for the benefit of their creditors, giving defendant power to dispose  
of the same & collect and receive the pay therefor - he also  
admits that he accepted, and entered upon the discharge of the  
trusts thereby created.

41  
This Defendant further says that it was part of the  
terms and conditions of said assignment that he should hold  
the said property to him conveyed as aforesaid in trust for the  
creditors of the said William & Frederick Buckhart & that he  
should pay over the proceeds derived from the sale thereof to  
their several creditors and said Markus insists that he has done  
this and has now no funds of said Buckhart, in the manner  
and in the order in said assignment designated.

42  
This defendant further answering says that he is not  
informed save by the said Petitioner's Petition whether the said



Petitioner filed his original Petition in this cause within the time prescribed by the Statute as alleged in said Supplemental Petition & cannot get forth as to his belief or otherwise.

43

This Defendant further answering says - That he admits that after the filing of the said Original Petition and sometime in the month of June A. D. 1858 he sold and transferred the said Steam Engine & Boiler and the appurtenances thereof to Messrs Phillips & May of Chicago aforesaid for the sum of Four hundred dollars & that said property was included in the transfer

44

to him by the assignment aforesaid - that he received therefor the sum of One hundred and fifty dollars in cash, the balance of Two hundred & fifty dollars being secured by a promissory Note,

45

that said said Note was by him collected - he further says that said Engine & Boiler & appurtenances thereof were placed and standing in a certain Building being upon the lot described in said Supplemental Petition, at the time he removed and sold them as aforesaid, & that he has been informed & believes that they have been used by the said William & Frederick

46

Buckhart - But he denies possessing any "materials" from said premises or selling or disposing of any or other property than is hereinbefore specified, which was sold said Buckharts, by Petitioner.

47

This Defendant further says that the said Engine, boiler and appurtenances were personal property - that they were not attached to the premises as fixtures or otherwise, but were completely detached therefrom & capable of being removed from the premises without marring or injuring or otherwise affecting them -

48

that they were simply placed in the building, not as fixtures -



49

and were never considered, nor were they a part of the Estate of the said Petitioner until known that they were not "materials" furnished for "erecting or repairing any building on the appurtenances of any building." That at the time of the sale there

50

the said Petitioner did not know that the said Engine &c was to be erected or placed on said Lot or in said building, nor did he know where the same was to be placed, as by the Contract attached to Volume 2 part of the said Original Petition will appear and to which this Defendant begs leave to refer - That said Engine &c was looked upon at all times by each of the parties as a Chattel and was so treated: Such no fact is ever was.

51

And this defendant further says that in the discharge of his duty as trustee, under the assignment aforesaid, to pay the said Engine, Boiler & appurtenances aforesaid and that also of the money by him received therefor, he has paid over to the Creditors the said William & Frederick Buckhart in accordance with the

52

obligations imposed by said assignment. And that at the time of the sale and removal of said Engine &c as aforesaid he had no actual notice of any proceedings being pending or instituted against or in favor thereof.

53

This defendant further answering says - That he has been informed and believes it to be true that said William & Frederick Buckhart hold through an assignment by one Dea's from the said Ogden a Contract for the conveyance of the said Lot to mentioned and that there is still one payment thereon unpaid & not due - but that the said Ogden has not declared a forfeit

54



of said Lot or contract, and that the said Buckharts William &  
55 Frederick had a valuable residuary interest in the same, and  
that there is and was at the time of supplying the said engine  
and obtaining said Deed a frame Building on said premises  
of the value of from \$800 to \$4000.

This defendant further says. he is not informed and by  
56 the said Supplemental Petition whether or not the said Petitioner  
has discovered that the said William & Frederick Buckharts  
have any interest in said premises within reach of process from  
this Court who cannot set forth the same as to his belief or to  
otherwise - but this Defendant avers & insists that they still have  
a valuable - in said premises (and subject to the assignment to  
this Defendant aforesaid) within reach of proper process from  
this Court - but that he is ignorant of the particular value  
thereof.

57 And this Defendant submits to the Judgment of this  
Honorable Court whether the said Petitioner ought not to first  
satisfy the interest of the said William & Frederick Buckharts  
in said lot (if ever he had any lien thereon, which this  
Defendant in no wise admits) before seeking to reach the  
proceeds of the said engine &c as aforesaid.

58 And whether all of the circumstances considered the said  
Petitioner has or ever had a lien upon the engine boiler &  
appurtenances aforesaid and whether he has any higher right  
to the proceeds of the same than other creditors of the said  
William & Frederick Buckharts.

And which matters and things this Defendant is willing  
and ready to maintain & prove as this Honorable Court shall



direct & humbly asks to be hence dismissed with his reasonable  
costs in this behalf most wrongfully sustained.

O.R. H. Linn.

Fr: Markus:

Defts Sub.

"State of Illinois  
Court County ... } Si.

59

Frederick Markus being duly sworn says  
that he is the Defendant above named that he has heard read  
the foregoing answer & that the matters and things therein  
stated are true of his own knowledge, except those therein so  
stated to be upon information and belief, and as to those he  
believes them to be true.

Sworn to and subscribed  
before me this 20<sup>th</sup> day of  
May A.D. 1859 . . . .

Fr: Markus:

L. H. Davenport

Notary Public

60

And thereafter to wit on the Twenty ninth day of November  
A. D. Eighteen hundred and fifty nine the said Plaintiff filed  
in the Office of the Clerk of said Court his Replication in  
words and figures as follows to wit,

"Superior Court of Chicago.

Charles Riesing

vs

Frederick Markus

The Replication of Charles Riesing Plaintiff



to the answer of Frederick Markus Defendant

This replant saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of Exception which may be had or taken to the manifold and insufficiencies of the said answer for replication Hereunto says he will ever maintain and prove his Supplemental Petition to be true, certain and sufficient in the law to be answered unto And that the said answer of the said Defendant is uncertain untrue and insufficient to be replied unto by this replant without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and truly well and sufficiently replied unto confessed or avowed traversed or denied is true And which matters and things this replant is and will be ready to aver maintain and prove as this Honorable Court shall direct and humbly prays and wishes by his said Supplemental Petition he has already prayed

Boventry & Mountree

Sols. for Petr.

11.

And afterwards to wit on the sixth day of January (being one of the days of the said January Term of said Court A.D. eighteen hundred and sixty, the following proceedings were had and entered of Record in said Court to wit.

Charles Reising

vs

Memo Lien - Decree.

Frederick Markus

This cause having been this day brought on to be heard upon the Petition, answer and replication filed herein



62  
It is ordered adjudged and decreed, and this Court by virtue  
of the authority therein vested unto them adjudged and decreed that  
the said Frederick Markus pay to the said Petitioner Charles Reising  
the sum of Four hundred dollars with interest thereon at the rate  
of Six per Cent per annum from the Eighth day of December in  
the year of our Lord One thousand eight hundred and fifty eight  
amounting to the sum of Four hundred and twenty five dollars  
and that the said Petitioner Charles Reising have execution therefor  
against the Lands and Tenements goods Chattels Property and Effects  
of the said Frederick Markus.

And afterwards to wit on the Twenty third day of  
January (being sixth of the said January Term of said Court)  
A.D. Eighteen hundred and fifty nine, the following proceedings  
were had in said cause and entered of record in said Court,  
to wit:—

"Charles Reising

— vs —

Frederick Markus

} Petition for Mechanics Lien

} Appeal prayed and allowed

63  
This day comes said Defendant Frederick  
Markus and prays and Appeals hereto to the Supreme Court  
which is allowed to him on filing Bond in the sum of Five  
hundred dollars with security to be approved by a Judge of  
this Court, Bond with Bill of Exceptions to be filed within  
fifteen days.



And thereafter to wit on the Twenty third day of  
January A.D. Eighteen hundred and fifty the said defendant  
Markus, filed in the Office of the Clerk of said Court his  
Appeal Bond in words and figures as follows, to wit,

"Know all Men by these Presents That we Charles Scherert  
and Frederick Markus of the County of Cook in the State of  
Illinois are held and firmly bound unto Charles Reisig of  
Chicago in the County and State aforesaid in the penal sum  
of Seven hundred dollars Current money of the United States  
to the payment of which well and truly to be made we bind  
ourselves our heirs executors and administrators jointly severally  
and firmly by these presents.

Witness our hands and seals this twenty third day of  
January A.D. 1860.

The Condition of the above obligation is such that whereas  
the said Charles Reisig did on the Seventh day of January  
A.D. 1860 in the Superior Court of Chicago, in the County of  
Cook and State of Illinois recover a judgment against the  
above bounden Frederick Markus for the sum of Four  
hundred and twenty five dollars damages and  
costs from which said judgment of the said Superior Court of  
Chicago, the said Frederick Markus has prayed for and  
obtained an Appeal to the Supreme Court of the State of  
Illinois.

Now if the said Frederick Markus shall prosecute said  
Appeal with effect and shall moreover pay the amount of the  
Judgment costs interest & damages rendered & to be rendered



against him in case the said Judgment shall be affirmed in  
the said Supreme Court then the above obligation to be void  
otherwise to remain in full force and virtue.

Taken and entered into before  
me at my Office in Chicago  
this twenty third day of January  
A. D. 1860.

Fr: Markus (Seal)  
Chr: Scherret (Seal)

Witness - Approved Jan'y 23/60.

Grant Goodrich. Judge of C.

"State of Illinois }  
Cook County . . . } Ss

Walter Kimball Clerk of the Superior Court  
of Chicago (formerly Cook County Court of Common Pleas) in  
and for said County and State aforesaid Do hereby certify the  
above and foregoing to be a full, true and correct Transcript  
of the papers now on file in my Office, together with the orders  
and Judgment entered of record in said Court in a certain  
suit therein, wherein Charles Kussig was Plaintiff and William  
Buckhart, Frederic Markus and others were Defendants.



On testimony whereof I have hereunto set  
my hand and affixed the Seal of said Court  
at Chicago in said County the Twenty fifth  
day of February A. D. 1860.

Walter Kimball Clerk



And now comes the said Defendants  
Frederick Markus by Woodward, Luce &  
Abbott his attorneys says that in the decree  
recent & proceedings aforesaid there is manifest  
error. In this viz:

\* The Court erred in holding

1 That the Petitioner was entitled to a lien in  
the case made -

2 That a lien attached to the machine  
& appurtenances mentioned.

3. That such lien prevailed over the general  
creditors.

4. In overruling the Demurrers -

5 Under the Supplemental Bill -

That the Lien followed the proceeds  
in the hands of the assignee & that Markus  
was liable

6 In rendering a Decree in favor of  
Complainant instead of respondent -

Woodward Luce &  
Attys for  
Appellee  
C. Breckinridge  
for Appellee



277  
State of Illinois  
Cook County

Charles Reissig . . P

vs. ————

William Buckhart

Frederic Markus et al

Record.

\$9.50 Paid Whittaker



STATE OF ILLINOIS,  
SUPREME COURT. }

CHARLES REISIG,  
v.  
WM. & FRED. BURKHART,  
WM. B. OGDEN, and  
FRED. MARKUS.

} From Superior Court of  
the City of Chicago.  
COOK COUNTY.

The complainant brought his bill in the Cook County Court of Common Pleas, from which it was transferred to the above named Superior Court.

The bill was brought to establish a lien on Lot 16 in Block 43 in Ogden's Addition to Chicago. The ground of petitioner's claim is the furnishing, or the making a steam engine and boiler, with their appurtenances.

Ogden is made defendant as the holder of the title to the lot, under whom the Burkharts hold a title-bond, not fully paid.

Markus is the assignee of the Burkharts for the benefit of their creditors.

A decree having been rendered in favor of the petitioner, the defendant Markus appeals, and assigns the following



as errors in the decree, record and proceedings of the court below.

The deft. urges that the court erred in holding,

- 1st. That the petitioner was entitled to a lien in the case made;
- 2nd. That a lien attached to the machine and appurtenances;
- 3rd. That such lien prevailed over the general creditors;
- 4th. In overruling the demurrers. Under the Supplemental Bill;
- 5th. That the lien followed the proceeds into the hands of the assignee, and that Markus was liable;
- 6th. In rendering a decree in favor of the complainant, instead of the respondent.

Without further statement we come to the questions made.

The respondents demurred to the bill. The demurrer was overruled, and they standing upon it, a decree was rendered for the petitioner as upon a bill taken *pro confesso*.

The first ground of demurrer is, that a mechanic's lien does not hold in such a case. The averments of the bill are, that the petitioner agreed with the deft's, the Burkharths, who were in partnership, to furnish them a steam engine and boiler and appurtenances thereto belonging, and did furnish the same, together with several enumerated articles belonging thereto, and placed and erected the same for the deft's in their frame building situate as above mentioned. Then follows in the bill, a statement of the terms of payment.

The contract is exhibited. Its form and substance is as follows. The petitioner agrees "to build" for the deft's



Burkhart an upright steam engine of certain dimensions and of a description which then follows. Then come the terms of payment, and the conclusion is, "the party of the first part (plaintiff) hereby agrees to have the work complete in three weeks from date and furnish one man to put up the same in the city of Chicago." This is the whole of the contract. There are in it, no words referring to any lot or tract of land.

*Purple's E.*  
V. 2. p. 724.

The statute (Seate's Ed. V. 1. p. 156.) provides that one contracting to furnish labor or materials for erecting or repairing any building, or the appurtenances of any building on such land or lot, may have a lien.

We contend that the case does not come within the statute. The contract must be made with reference to some specific, known building or lot. This engine was to be put up any where in Chicago that the deft's chose. There is no allusion to a lot or tract of land. It is, in fact, a contract simply to build an engine and boiler, and to give some aid in setting them up.

It is a matter of common observation to persons in the law, that when any right like this is given by statute, there is a tendency—a pressure—of the minds of those concerned, to extend the right beyond the original intent of the law. This is natural, for every one wants the benefit of it. But what was the design of the act. It is not, to give every species of manufacturer, or artizan, a lien for his work, and to extend that lien from this article to other buildings and to land. We may think this advisable, and that the law should be so, but it is not so.

He that manufactures an article, a piece of machinery — an engine, for instance—has his lien, or that which answer to



it, from another source and in another manner. He may retain it till he is paid or secured. So, if he repairs, he has a lien, strictly. But, at common law, when one builds or repairs a building for another, he has no lien.—He cannot refuse to deliver, or hold back, the object of work, until he is paid. The law intends to place him on an equality with those who already had those other liens. But it does not mean to extend in a new manner, and to new objects, the liens before existing. This question was not made in *Gaty v. Casey*. 15. Ill. 189. But it would seem quite as essential that the contract should refer to the land and specify it, as that the time of completion of the work and of payment of the money should appear.

The idea of the statute is, that he who contributes his means to enable another to improve his lot, shall have a lien. But the very essence of this is, that he furnishes his materials for this express purpose—to assist in the building, in the improvement.

If I purchase a parcel of lumber with no present intent of building, and store it on my lot, and afterward conclude to build, either there or elsewhere, I am unable to see how the vendor can say he furnished material *for* my building—that is, with any *purpose* or *intent* that it should go into my building.

What is necessary to be averred is, *a fortiori*, requisite to be in the contract, and in this view the following cases are thought to be pertinent.

*Muller v. Smith*, 3. Scam. 543, *Cook v. Heald*, *Vreeland and Rofinot* 21. Ill's. 425, 431, 437 and 22 do 252.

*Second.* This contract does not relate to the erection or repair of a building, nor its appurtenances. The making, and even the putting up, an engine cannot be regarded as the



repair of the building in which it is placed—nor can it be the erection of the appurtenances of a building. In some sense the engine may be regarded as appurtenant to the building, when once put there, but it is in a loose sense only, and by no means in the sense of the act. This refers to barns, sheds, &c., & possibly to fences round a lot. It means other buildings and structures—outhouses and the like—belonging usually to such a building.

*Third.* The petition does not show when the work was performed, nor when the money was to be paid. This latter stands on a matter of fact, in pais. The contract provides for the last payments in four and eight months from the time the engine was taken from the shop of the plaintiff, but there is no averment when that was. Those last payments were to be secured by the notes of the debts, and such are not made part of the case. So that it does not appear when payment was to be made, nor can it be known but by the proof. The court, therefore, cannot know whether the contract is within the law, nor whether the suit is commenced within the six months.

But further, the complain't claims the sum of \$ 1228.73. It appears from the contract and bill, that the price of the engine and boiler was to be \$1010.25. Beside these, other parts and appurtenances were made for which he charges \$218.48. According to the construction of the contract given in the bill, these things were not to be paid for at the same time with the engine, nor does the contract fix any time; neither does the bill aver any. This part of the contract, then, is left at loose ends. There is no time for payment provided, nor is there one alleged, nor can we tell whether the action is brought within the time limited.

On this point we refer to the cases of *Cook v. Heald* and other parties, above cited.



Another part of the case is the following. After a decree for the petitioner on the original bill, he filed a supplemental bill against the deft. Markus, charging him with having taken away and sold, the said steam engine and boiler with the appurtenances, and praying a decree against him for the amount for which he sold them, which was \$400,00.

It is alleged that, pending the original bill, the Burkharts assigned their property to the said Markus, for the benefit of their creditors. This is admitted by the demurrer, as well as the sale. It was by virtue of this assignment that Markus disposed of the machinery.

To this supplemental bill the deft. Markus demurred. We here renew, and call attention to, the causes of demurrer before stated, and then advert to the third cause assigned under the supplemental bill, which is,

3rd. That it does not appear but that the engine and boiler and appurtenances were personal property.

If these were not fixtures, then it is impossible to hold that a mechanic's lien followed, and attached to them.

Whatever might be held, in this respect, as between him and executor, or vender and vendee of the realty, we maintain that, between the mechanic and the owner, they are not fixtures.

First, however, we remark that the bill makes no averments going to show that these things were in any manner so affixed as to render them fixtures. There is an entire want of any showing in this respect.

Then, assuming the allegations to be sufficient, is such their character? Much more freedom is allowed in favor of trade and commerce, that would be between some other re-



lations. We do not propose to attempt an argument of this point, for its nature does not admit of it, but will refer to two or three authorities. *Walker v. Sherman*, 20. Wend. 636, is a leading case, and reviews many of them. The greater liberality shown to tenants, is repeatedly recognized, p. 643. And in some cases a steam engine is not held to be a fixture, or to be a part of the realty. The method of affixing (and the degree) is a useful criterion, but not a certain one. In one instance articles much more strongly affixed may be taken, whilst in another those very slightly fastened, or actually movable, cannot, 1. Pars. on Con. 430, Sec. 6, and see his note of instances, when removable and when not, and of trade fixtures held removable.

*Holmes v. Tremper*, 20, J. R. 29, 2 Kent. 425, top. 343, marg.

*Elwes v. Maw*, 3. East, 38, and in 2. Smith's Lead. Ca. 89 mar. 196, top. and note. Against part of this case is 10. Barb. 496. *Dubois v. Kelly*.

#

Again, as said above, Markus is assignee for the benefit of creditors, and the machine was sold for their benefit. The question, then, arises, whether the plaintiff was entitled to a lien as against the general creditors of the debts. We think not. The court below rendered a decree against Markus for the amount for which he sold the engine &c.

And further, if this machinery is held to be a fixture so as to draw a lien to it as well as to the building, then we say it was subject to the rights (e. g. vendor's lien) of Ogden, and if Markus had not a right to remove it, so the pltf. had not, and his rights and powers were subservient to those of the vendor of the land. And as he could not have taken out the machinery and sold it for his own account alone, he cannot come upon Markus for the *whole* of the price.

# We should have remarked the fact that Markus had no notice of proceedings against the property before he sold.



Second and fourth cause of demurrer. The complainant does not show that any decree has been rendered against the premises, nor that a lien was established. A mere verdict of a jury is not sufficient. He may be entitled to his price of labor or materials, but without a lien. It is essential that the decree should declare the lien—that is, find that he is entitled to one, and establish it. This is the object of the suit. The lien given by the law is nothing until it is ascertained, declared and established by a decree of the court.

Fifth. There was a property, or an interest, which petitioner might, and ought to, have resorted to before subjecting the assignee of the creditors. This was the interest of the Burkharts in the lot, and this interest was the value of the whole above what was due to Ogden. Treating it as two funds to which he might resort, the court should not have allowed him to take the money from the assignee's private pocket, without first exhausting that fund which would not compromise the assignee. The proceeding is but a substitute for an action on the case for damages, and how does it appear that plaintiff has been harmed, until he sees whether he could not make his money (or so much of it) from the lot? Perhaps we should urge this argument rather against the propriety of the decree, than as under the demurrer.

We desire to remark, that the main portion of the foregoing remarks is applicable under either demurrer, and we request that it may be so taken, to save repetition.

Woodward, Gull  
& Abbott -  
Attys for Defs



211-97

Markno

vs

Reifing

Brief

Filed Apr 18. 1860

Laund  
Clerk



## ABSTRACT.

### IN SUPREME COURT, STATE OF ILLINOIS.

CHARLES REISIG,

v.

WILLIAM BURKHARDT,  
FRED. BURKHARDT,  
WM. B. OGDEN, and  
FREDERICK MARKUS.

} Appeal.

*Charles Reisig*  
This was a Bill filed by complainant against defendants to establish a mechanics Lien.

The Bill alleges that the Petitioner Charles Reisig on the 22nd day of April A. D. 1859, entered into a contract with William Burkhardt and Frederick Burkhardt two of the defendants who were partners and doing business in the city of Chicago, in which the petitioner at the special instance and request of said defendants agreed to furnish them a steam engine and boiler and appurtenances thereto belonging and that he did furnish the same together with smoke-pipe and shafting, hangers, bolts and nuts, lead pipe, turning shaft and sheet iron box and *placed and erected* the same for the said defendants in their frame building situate on Lot No. 16, in Block No. 43, Ogdens Addition to Chicago. And that the defendants in consideration therefor agreed to pay said petitioner for



2  
the Steam Engine and Boiler Ten Hundred and Ten Dollars and 25 Cents in the following manner viz: \$200 at the time of the date of said contract, \$200 at the time said engine and boiler was finished at the shop of said petitioner in Chicago and the balance in four and eight months from the time said engine and boiler should leave said shop—and for the said smoke-pipes, shafting, hangers and other articles enumerated in the bill of particulars annexed to said bill so much as they were reasonably worth and at the price in said bill noticed.

3  
And the petition farther alledges that there was then due to the petitioner from the defendants Burkhart upon said contract the sum of Five Hundred and fourteen Dollars and thirty seven cents together with the interest thereon, and that six months had not elapsed since the last payment upon said contract and for said articles was to be made.

4  
And that said petitioner was informed and believed that William B. Ogden, Frederick Markus and Caleb O. Halstead had or claimed some interest in said premises and prayed that they might be made parties to the said proceedings.

5  
Petitioner further prays the "usual process" of the said Court and that his lien might be preserved to him and that judgment might be rendered against said premises and the materials so furnished for the said sum of \$514.37 and interest thereon. And that the said William B. Ogden, Frederick Markus and Caleb O. Halstead might be forever barred and foreclosed of their interest therein, and that the said petitioner might have such other and further relief as he might be entitled to under the statute.

The petition is signed

Coventry Rountree & Vaughan,  
*Attornys for Petitioner.*

And is not verified by affidavit.



The contract referred to in the petition and filed with  
the same is as follows:





The following account referred to in the said petition is also filed with the same.

Chicago, November 17th 1859.

Messrs. Wm. & Frederick Burkhart

To CHARLES REISIG, Dr.

|         |                                     |                   |
|---------|-------------------------------------|-------------------|
| May 21. | To 658 lb Smokepipe @ 9             | \$ 59 22.         |
| " 26.   | " 1 Engine and Boiler               | 1010 25.          |
| " "     | " Shafting, Hangers and 928 lb @ 10 | 92 80.            |
| " "     | " 39 lb Bolts and Nuts @ 10         | 3 90.             |
| May 27. | " 54 lb Brazes for Smokepipe @ 9    | 4 86.             |
| " 30.   | " 8 ft. Leadpipe                    | 2 90.             |
| June 1. | " 64 lb Shafting and flanges @ 10   | 6 40.             |
| " 6.    | " 1 Sheet Iron Box 184 lb @ 10      | 18 40.            |
| " 1.    | " 1 Steam Gauge and Pipe            | 29 00.            |
| " 15.   | " Turning Shaft                     | 1 00.             |
|         |                                     | <hr/> \$1,228 73. |

Which said petition and contract and account were filed in the office of the Clerk of the Cook County Court of Common Pleas, on the 10th day of May A. D. 1858, and thereupon and on the same day a summons was issued to summon William Burkhart, Frederick Burkhart, William B. Ogden and Frederick Markus, wick summons was returned

served on William Burkhart and Frederiek Burkhart, May 28th 1858, the others not found.

And thereafter and on the 17th day of June 1858, there issued an alias summons—which was on the 25th day of June 1858 returned served on Frederick Markus.



or to claim said premises from or under them, be foreclosed of all equity of redemption from said sale.

17 And thereafter on the 24th day of March A. D. 1859, the said petitioner filed in the same Court his second petition, entitled in the same cause and having the same parties, wherein he alledged that theretofore and on the 10th day of May A. D. 1858, he filed in the said Court his petition for a mechanic's lien against William Burkhart, Frederick Burkhart, William B. Ogden and Frederick Markus for materials, steam engine and boiler and the appurtenances thereto belonging, made and sold, and erected upon the lands claimed, as belonging to the said William and Frederick Burkhart, and in which the said William B. Ogden and Frederick Markus claimed some interest.

18 That in answer to said petition so filed, said defendants appeared and filed their demurrer and the same was overruled, that defendants not answering judgment of nil dicit was rendered and a jury empannelled and there was found due and owing to said petitioner from said William & Frederick Burkhart upon the contract for making, furnishing and erecting said materials upon the Lot 16, in Block 43, Ogdens Addition to Chicago, the sum of Five Hundred and thirty one Dollars and seventeen cents, and that said jury returned a verdict for said amount.

20 And the said petitioner further alledged, that some time before filing his said petition the said William and Frederick Burkhart made an assignment for the benefit of their creditors to said Frederick Markus, who ended upon the discharge of his duties as such assignee. That the petitioner filed his bill for obtaining a mechanics lien within the time prescribed by statute viz, within six months after the time the last payment

21



22 became due upon the contract for furnishing and erecting such materials as set forth and fully described in said petitioners original petition. That during the pendency of the original suit, the said Markus transferred the steam engine and boiler and the materials and appurtenances to some person or persons unknown—who removed the same from off the premises upon which they were erected and out of the jurisdiction of said court. And that he as assignee of said William and Frederick Burkhart received in payment money or other valuable thing. That said engine and boiler, materials and appurtenances had been removed from said premises and were not within the reach of process of the court to satisfy the judgment rendered in favor of said petitioner.

23 That said William and Frederick Burkhart had from said William B. Ogden a contract for the conveyance of the premises described, and upon which contract but one or two payments had been made and that on account of a failure to pay the installments due by said contract it was in danger of being forfeited and the interest of said William and Frederick Burkhart lost or so limited in extent as to be insufficient to satisfy the claim and judgment of said petitioner.

24 That petitioner could not discover any interest of said William and Frederick Burkhart or either of them in said premises or any part thereof sufficient or at all within reach of process of said court to satisfy said judgment.

25 The petitioner alleged, that Markus ought to be decreed to pay over to him the proceeds of the sale of the engine and boiler and the materials and appurtenances furnished, supplied and erected as aforesaid and described in the contract on file, or in case he has disposed of the same then that he ought to be decreed to pay petitioner the value thereof or enough to satisfy petitioners judgment.



26 ~~Petitioner~~ farther asks that Markus may answer whether he was not the assignee of said William and Frederick Burkhart, under an assignment made in 1857, or 1858, and whether he did not enter upon a discharge of his duties.

27 And whether he sold or in any way disposed of the steam engine and boiler and the materials and appurtenances of the same and if so to whom and at what time? and for what price and the quality, kind and condition of the consideration paid him for such engine, boiler and appurtenances.

28 And petitioner asked, that he might have the same relief against said Markus as if the facts therein stated had been stated in petitioners original bill. And that in case Markus should answer that he had not in his possession the proceeds of said engine, boiler and appurtenances—that then he might be decreed to pay to said petitioner the amount of his said judgment or so much thereof as he received on the sale of said engine, boiler and appurtenances and for such other relief as the case might require.

29 And prays for a summons against said Markus.

30 Petition verified by affidavit of petitioner.

31 And on the 4th day of May 1859, a summons was issued to said Markus, returned at the April term, then next and  
32 which was on the 25th day of March 1859, returned served.

33 And thereafter on the 2nd day of May 1859, the said Frederick Markus filed his demurrer to said petition and for special cause of demurrer stated—

1. That the petitioner by the exercise of proper diligence might have discovered the facts contained in the said supplemental bill in time to have used them in the original suit,



2. The petition does not show that any decree was entered against said premises in the original suit.
3. It did not appear but that the said engine and boiler and appurtenances thereto belonging were personal property.
4. That the petitioner showed no decree or lien or judgment of any kind against said engine and boiler or their appurtenances, or that he had any higher right therein than any other creditor.
5. That it did not appear but that the petitioner might have satisfied his demand by proceeding against the lot mentioned.
6. That the bill was in other respects informal and insufficient.

34  
35  
And thereafter and on the 19th day of September A. D. 1859, the demurrer was overruled and defendant ordered to answer over—which he did, and on the 24th day of September 1859, filed his answer and therein alledged.

36  
37  
That he admitted that on the 10th of May 1858, the petitioner filed his bill for a mechanics lien and that defendants appeared and filed a demurrer which was overruled—that a judgment of nil dieit was rendered and that thereupon came a jury who found that \$531,77 was owing said petitioner for the steam engine and boiler and appurtenances, but that said defendant did not recollect that petitioner made any claim for materials other than the engine, boiler &c. aforesaid, and said defendant denied that said petitioner furnished defendants materials otherwise, than as theretofore specified. And said defendants also denied that the jury found that the said sum specified was due the said petitioner for making, furnishing



38 and erecting any materials or the engine, boiler &c., or that the original petition showed any such contract, nor that there ever was any such contract in existence, but said defendant admitted that there was a contract set forth in said original petition for selling said Burkhardt a steam engine, boiler and appurtenances thereof, and that upon that the jury found the amount aforesaid, and that under said contract there was only one note of \$364.37 unpaid and no other or greater sum and which was all that said petitioner could rightfully claim, and as to the said several items contained in the bill of particulars defendant denies that complainant has by law any lien and claimed the same benefit as if he had specially demurred—but that instead of being a contract for the erection of said boiler &c. as mentioned upon said lot, or upon any particular lot, it was for its erection any where in the city of Chicago.

39 And the said defendant admitted that said William and Frederick Burkhardt made to said defendant Markus a general assignment of all his real and personal property for the benefit of his creditors, and that he defendant accepted same and entered upon a discharge of his duties.

40 And that is was a part of the conditions of said assignment that he should hold the property in trust for the creditors of said Burkhardt and should pay over the proceeds of the sale thereof to their creditors and that he the defendant had done so and had no funds of said Burkhardt in his possession and that he had paid the same in the order in said assignment directed.

41 That he was not informed save by said petition, whether petitioner filed his bill in the time presented by statute or not.

42 That he admits that after the filing of the original petition and sometime in the month of June 1858, he sold and



transferred the steam engine and boiler and appurtenances to Phillips & Fay of Chicago for the sum of \$400, and that  
 44 said engine, boiler and appurtenances was transferred to him by the assignment of the Burkarts.—That he received in cash \$150, balance of \$250, being secured by a promissory note  
 45 since then paid. Said defendant farther alleged that said engine and boiler and appurtenances were placed and standing in a certain building upon the lot described at the time he removed and sold them. But he denied removing any materials from said premises or selling or disposing of any other property.

Defendant further alleged that the said engine, boiler and appurtenances were personal property, that they were  
 47 not attached to the premises as fixtures or otherwise, but were completely detached therefrom and capable of being removed from the premises without injuring or otherwise affecting  
 48 them—that they were simply placed in the building—were never considered, nor were they a part of the estate—that they  
 49 were not "*materials furnished for erecting or repairing any building or the appurtenances of any building*"—that at the time  
 50 of the sale thereof the said petitioner did not know that the said engine &c. was to be erected or placed on said lot, or in said building, nor did he know where the same was to be placed as appears by the contract made a part of said petition, that said engine &c. was looked upon at all times by each of the parties as a chattle as it in fact was.

And the defendant further alleged that in discharge of his his duty as Trustee under said assignment he sold said engine, boiler and appurtenances and that all of the money by him received therefor he has paid over to the creditors of the Burkarts according to the terms of the assignment and that  
 52 at the time of the sale and removal of said engine &c., he had no actual notice of any proceedings being pending or instituted to enforce a lien thereon.



53 That defendant had been informed and believed to be true that the Burkharths held through an assignment by one Dietz from said Ogden and contract for said lot, and that there was still one payment thereon unpaid and now past due—but that said Ogden had not declared a forfeiture and that said Burkharths had a valuable residuary interest in the same and that there was at the time of filing the bill & also at the time of supplying said engine and of obtaining said decree a frame building on said premises of the value of from \$800 to \$1000.

55 That defendant aver that the Burkharths had a valuable interest in said premises and subject to the assignment to said defendant within reach of process of said court—but he could not state the particular value thereof.

57 And the said defendant submitted to the judgment of said court, whether the said petitioner ought not to first exhaust the interest in said lot (in case he had any lien thereon, which said defendant denied) before seeking to reach the proceeds of the said engine &c.

58 And whether the said petitioner had then or ever had any lien upon the engine, boiler and appurtenances and whether he had any higher right to the proceeds of the same than other creditors of said Burkharths—wherefore said defendant prayed to be hence dismissed with his costs by him most wrongfully sustained.

59 Which said answer was verified by the affidavit of the said Frederick Markus.

60 To which the said petitioner filed a general replication.



61 And thereafter and on the 6th day of January 1860, a decree was entered in said case (the same having been brought on to be heard on petition—answer and replication) by which decree the said Markus was ordered to pay to the said petitioner Charles Reisig the sum of \$400, with interest thereon at the rate of six per cent per annum from December 8th 1858, amounting to the sum of \$426, and that said petitioner have execution therefor against the lands and tenements, goods chattels, property and effects of the said Frederick Markus.

62 And thereupon the said defendant Markus prayed an appeal which was granted on his filing a bond to be approved by the judge of said court in the sum of \$700.

63 Which was on the 3d day of January 1860 done.

And thereupon the said defendant Markus assigned the following errors viz:

The court erred in holding.

1. That the petitioner was entitled to a lien in the case made.
2. That a lien attached to the machine and appurtenances.
3. That such lien prevailed over the general creditors.
4. In overruling the demurrers.
5. Under the supplemental bill that the lien, followed the proceeds in the hands of the assignee.
6. In entering a decree in favor of the complainant instead of the respondent.

WOODWARD, LULL & ABBOTT,

*Attornys for Defendant.*



211-99

Beisig

vs

Bornhardt & als

Abstract

Filed Apr 18, 1860

L. Schmidt

Clerk



STATE OF ILLINOIS,  
SUPREME COURT. }

CHARLES REISIG,  
v.  
WM. & FRED. BURKHART,  
WM. B. OGDEN, and  
FRED. MARKUS. }

From Superior Court of  
the City of Chicago.  
Cook County.

The complainant brought his bill in the Cook County Court of Common Pleas, from which it was transferred to the above named Superior Court.

The bill was brought to establish a lien on Lot 16 in Block 43 in Ogden's Addition to Chicago. The ground of petitioner's claim is the furnishing, or the making a steam engine and boiler, with their appurtenances.

Ogden is made defendant as the holder of the title to the lot, under whom the Burkharths hold a title-bond, not fully paid.

Markus is the assignee of the Burkharths for the benefit of their creditors.

A decree having been rendered in favor of the petitioner, the defendant Markus appeals, and assigns the following

SUBMITTED TO THE COURT



as errors in the decree, record and proceedings of the court below.

The deft. urges that the court erred in holding,

- 1st. That the petitioner was entitled to a lien in the case made;
- 2nd. That a lien attached to the machine and appurtenances;
- 3rd. That such lien prevailed over the general creditors;
- 4th. In overruling the demurrers. Under the Supplemental Bill.
- 5th. That the lien followed the proceeds into the hands of the assignee, and that Markus was liable;
- 6th. In rendering a decree in favor of the complainant, instead of the respondent.

Without further statement we come to the questions made.

The respondents demurred to the bill. The demurrer was overruled, and they standing upon it, a decree was rendered for the petitioner as upon a bill taken *pro confesso*.

The first ground of demurrer is, that a mechanic's lien does not hold in such a case. The averments of the bill are, that the petitioner agreed with the deft's, the Burkharts, who were in partnership, to furnish them a steam engine and boiler and appurtenances thereto belonging, and did furnish the same, together with several enumerated articles belonging thereto, and placed and erected the same for the deft's in their frame building situate as above mentioned. Then follows in the bill, a statement of the terms of payment.

The contract is exhibited. Its form and substance is as follows. The petitioner agrees "to build" for the deft's



Burkhart an upright steam engine of certain dimensions and of a description which then follows. Then come the terms of payment, and the conclusion is, "the party of the first part (plaintiff) hereby agrees to have the work complete in three weeks from date and furnish one man to put up the same in the city of Chicago." This is the whole of the contract. There are in it, no words referring to any lot or tract of land.

*Purple's E.*  
V. 2. p. 724.

The statute (Scate's Ed. V. 1, p. 156.) provides that one contracting to furnish labor or materials for erecting or repairing any building, or the appurtenances of any building on such land or lot, may have a lien.

We contend that the case does not come within the statute. The contract must be made with reference to some specific, known building or lot. This engine was to be put up any where in Chicago that the deft's chose. There is no allusion to a lot or tract of land. It is, in fact, a contract simply to build an engine and boiler, and to give some aid in setting them up.

It is a matter of common observation to persons in the law, that when any right like this is given by statute, there is a tendency—a pressure—of the minds of those concerned, to extend the right beyond the original intent of the law. This is natural, for every one wants the benefit of it. But what was the design of the act. It is not, to give every species of manufacturer, or artizan, a lien for his work, and to extend that lien from this article to other buildings and to land. We may think this advisable, and that the law should be so, but it is not so.

He that manufactures an article, a piece of machinery — an engine, for instance—has his lien, or that which answer to



it, from another source and in another manner. He may retain it till he is paid or secured. So, if he repairs, he has a lien, strictly. But, at common law, when one builds or repairs a building for another, he has no lien.—He cannot refuse to deliver, or hold back, the object of work, until he is paid. The law intends to place him on an equality with those who already had those other liens. But it does not mean to extend in a new manner, and to new objects, the liens before existing. This question was not made in *Gaty v. Casey*. 15. Ill. 189. But it would seem quite as essential that the contract should refer to the land and specify it, as that the time of completion of the work and of payment of the money should appear.

The idea of the statute is, that he who contributes his means to enable another to improve his lot, shall have a lien. But the very essence of this is, that he furnishes his materials for this express purpose—to assist in the building, in the improvement.

If I purchase a parcel of lumber with no present intent of building, and store it on my lot, and afterward conclude to build, either there or elsewhere, I am unable to see how the vendor can say he furnished material *for* my building—that is, with any *purpose* or *intent* that it should go into my building.

What is necessary to be averred is, *a fortiori*, requisite to be in the contract, and in this view the following cases are thought to be pertinent.

*Muller v. Smith*, 3. Scam. 543, *Cook v. Heald*, *Vreeland and Rofinot* 21. Ill's. 425, 431, 437 and 22 do 252.

*Second.* This contract does not relate to the erection or repair of a building, nor its appurtenances. The making, and even the putting up, an engine cannot be regarded as the



repair of the building in which it is placed—nor can it be the erection of the appurtenances of a building. In some sense the engine may be regarded as appurtenant to the building, when once put there, but it is in a loose sense only, and by no means in the sense of the act. This refers to barns, sheds, &c., & possibly to fences round a lot. It means other buildings and structures—outhouses and the like—belonging usually to such a building.

*Third.* The petition does not show when the work was performed, nor when the money was to be paid. This latter stands on a matter of fact, in pais. The contract provides for the last payments in four and eight months from the time the engine was taken from the shop of the plaintiff, but there is no averment when that was. Those last payments were to be secured by the notes of the debts, and such are not made part of the case. So that it does not appear when payment was to be made, nor can it be known but by the proof. The court, therefore, cannot know whether the contract is within the law, nor whether the suit is commenced within the six months.

But further, the complain't claims the sum of \$ 1228.73. It appears from the contract and bill, that the price of the engine and boiler was to be \$1010.25. Beside these, other parts and appurtenances were made for which he charges \$218.48. According to the construction of the contract given in the bill, these things were not to be paid for at the same time with the engine, nor does the contract fix any time; neither does the bill aver any. This part of the contract, then, is left at loose ends. There is no time for payment provided, nor is there one alleged, nor can we tell whether the action is brought within the time limited.

On this point we refer to the cases of *Cook v. Heald* and other parties, above cited.



Another part of the case is the following. After a decree for the petitioner on the original bill, he filed a supplemental bill against the deft. Markus, charging him with having taken away and sold, the said steam engine and boiler with the appurtenances, and praying a decree against him for the amount for which he sold them, which was \$400,00.

It is alleged that, pending the original bill, the Burkharts assigned their property to the said Markus, for the benefit of their creditors. This is admitted by the demurrer, as well as the sale. It was by virtue of this assignment that Markus disposed of the machinery.

To this supplemental bill the deft. Markus demurred. We here renew, and call attention to, the causes of demurrer before stated, and then advert to the third cause assigned under the supplemental bill, which is,

3rd. That it does not appear but that the engine and boiler and appurtenances were personal property.

If these were not fixtures, then it is impossible to hold that a mechanic's lien followed, and attached to them.

Whatever might be held, in this respect, as between him and executor, or vender and vendee of the realty, we maintain that, between the mechanic and the owner, they are not fixtures.

First, however, we remark that the bill makes no averments going to show that these things were in any manner so affixed as to render them fixtures. There is an entire want of any showing in this respect.

Then, assuming the allegations to be sufficient, is such their character? Much more freedom is allowed in favor of trade and commerce, that would be between some other re-



lations. We do not propose to attempt an argument of this point, for its nature does not admit of it, but will refer to two or three authorities. *Walker v. Sherman*, 20. Wend. 636, is a leading case, and reviews many of them. The greater liberality shown to tenants, is repeatedly recognized, p. 643. And in some cases a steam engine is not held to be a fixture, or to be a part of the realty. The method of affixing (and the degree) is a useful criterion, but not a certain one. In one instance articles much more strongly affixed may be taken, whilst in another those very slightly fastened, or actually movable, cannot, 1. Pars. on Con. 430, Sec. 6, and see his note of instances, when removable and when not, and of trade fixtures held removable.

*Holmes v. Tremper*, 20, J. R. 29, 2 Kent. 425, top. 343, marg.

*Elwes v. Maw*, 3. East, 38, and in 2. Smith's Lead. Ca. 89 mar. 196, top. and note. Against part of this case is 10. Barb. 496. *Dubois v. Kelly*.

(H) Again, as said above, Markus is assignee for the benefit of creditors, and the machine was sold for their benefit. The question, then, arises, whether the plaintiff was entitled to a lien as against the general creditors of the debts. We think not. The court below rendered a decree against Markus for the amount for which he sold the engine &c.

And further, if this machinery is held to be a fixture so as to draw a lien to it as well as to the building, then we say it was subject to the rights (e. g. vendor's lien) of Ogden, and if Markus had not a right to remove it, so the pltf. had not, and his rights and powers were subservient to those of the vendor of the land. And as he could not have taken out the machinery and sold it for his own account alone, he cannot come upon Markus for the whole of the price.

(H) We should have noticed  
that Markus had no notice  
of proceedings against the  
property, before he sold



Second and fourth cause of demurrer. The complainant does not show that any decree has been rendered against the premises, nor that a lien was established. A mere verdict of a jury is not sufficient. He may be entitled to his price of labor or materials, but without a lien. It is essential that the decree should declare the lien—that is, find that he is entitled to one, and establish it. This is the object of the suit. The lien given by the law is nothing until it is ascertained, declared and established by a decree of the court.

Fifth. There was a property, or an interest, which petitioner might, and ought to, have resorted to before subjecting the assignee of the creditors. This was the interest of the Burkharts in the lot, and this interest was the value of the whole above what was due to Ogden. Treating it as two funds to which he might resort, the court should not have allowed him to take the money from the assignee's private pocket, without first exhausting that fund which would not compromise the assignee. The proceeding is but a substitute for an action on the case for damages, and how does it appear that plaintiff has been harmed, until he sees whether he could not make his money (or so much of it) from the lot? Perhaps we should urge this argument rather against the propriety of the decree, than as under the demurrer.

We desire to remark, that the main portion of the foregoing remarks is applicable under either demurrer, and we request that it may be so taken, to save repetition.

Woodward, Gule  
& Abbott.



211 - 977  
Supreme Court

Markus - Piff  
in error

Charles Russig -

Left in error

Brief -

Filed Apr 18. 1840

Admiral

Blair