

No. 13057

Supreme Court of Illinois

^O
~~M~~aser

vs.

Matt et al

STATE OF ILLINOIS,

SUPREME COURT.

Third Grand Division.

186220.

Meyer
vs
Halt

13057

55- 220

SUPREME COURT,
THIRD GRAND DIVISION,

April Term, A. D. 1860.

PHILIP MOSER,

vs.

JACOB MATT, and

WILLIAM METZGER.

} MECHANIC'S LIEN.

ARGUMENT FOR PLAINTIFF IN ERROR.

Jameson & Morse, Printers, 14 La Salle Street.

Filed Apr 30, 1860
L. Deland
Clerk

IN SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM, 1860.

PHILIP MOSER

VS.

JACOB MATT AND
WILLIAM METZGER.

} *Error to Superior Court of Chicago.*

ARGUMENT FOR THE PLAINTIFF IN ERROR.

This is a case of Mechanic's Lien, and comes before this Court upon error assigned to the decision of the Superior Court of Chicago, in sustaining a demurrer to the petition of the Plaintiff in Error, and dismissing the same.

The allegations of the Petition being admitted by the Demurrer to be the facts in the case, the only question to be determined is, were these allegations sufficient in law to entitle the petitioner to the relief for which he prayed?

The petitioner sets out the date of the contract, March 1st, 1858; the description of the work; the price to be paid, and when, to wit, six months after completion of work; that work was completed May 15th, 1858, and accepted by defendant Matt; the amount of work performed, and the balance due Nov. 15, 1858, i. e., six months after completion; that the time for completion was not extended over three years, nor time of payment over one year from completion of work, and also the agreement as to the *time agreed upon for the completion* of the work, which is the only point in dispute here, and which will be fully set out hereafter.

The payment was due Nov. 15th, 1858, and the petition filed April 30th, 1859, which is within six months after the money was to be paid.

It is admitted by the Counsel for Defendants in Error, that the allegations of the petition were sufficient in every respect to entitle the petitioner to his lien, with one exception, to wit: that no specific time (as Defendants in Error contend) was agreed upon, at the time of making the contract, within which the work provided for therein was to be completed. It was upon this point that the Demurrer was sustained by the Court below, and the petition dismissed, and the question here presented is whether or not the averments of the petition as to the time of the completion of the work, presented such a contract as fulfilled the requirements of the statute in this regard, and entitled the petitioner to enforce his lien?

The language of the Petition on this point is as follows:

"That at the time of making the contract, no specific time was fixed within which the work was to be completed, but avers that it was perfectly understood between the parties that the work was *to be done at once*, that the frame was then erected, and the carpenters were at work finishing the same, and that the said work was, by the reasonable construction of said contract, to be commenced as soon as the house was ready to be plastered, and to be finished *within a reasonable time*. That *during the same spring was reasonable time*, and that the work was done within three months from the making of the contract." [The Petition also alleged that the contract was made March 1st, 1858, and was for doing the plastering and building the chimnies of the building in question.]

There can be no doubt that upon general understanding and the current of authority before the decision of the cases in 21 Ill., pp. 425, 431 & 437, and 22 Ill., p. 252, these allegations as to time of completion would have been held sufficient, and therefore the inquiry resolves itself into a single question,—does the case at bar fall within the purview of those decisions?

It is submitted on behalf of the petitioner (the Plaintiff in Error here) and for the reasons hereinafter stated, that the line of

demarcation between the case under consideration and those decisions is clearly and definitely drawn ; that this case fully meets and complies with the rule there established, and that therefore the decision of the Court below, in sustaining the demurrer, was erroneous.

The position which the Petitioner takes is this : that where a definite time is not specified in the contract for the performance thereof, it is then a presumption of law that the parties intended and agreed that the thing to be done, should be done in a reasonable time ; that in this case it was the distinct understanding between the parties that the work should be done at once, commenced as soon as possible and finished in a reasonable time, and that such reasonable time was during the same spring in which the contract was made, and that the work was completed accordingly. That if such be the irresistible implication of the law, then this case cannot be considered as falling within the rule laid down in the decisions on this point in the 21 & 22 *Ill.*, as those were cases where the petitioners failed to set out any specific time for completion of the work, or to aver that the work was to be completed in a reasonable time, and what such reasonable time was, and that the work was completed accordingly ; that is, those petitions utterly failed to present such a state of facts as in any point of view complied with the statute, or warranted the Court in arriving at any different conclusion than they did, while the case at bar, it is submitted, stands on entirely different ground, contains all the necessary averments wanting in those cases, and is not to be disposed of upon the authority of decisions which were solely applicable to the cases in which they were made, and others of a similar character.

If a contract specifies no time for its performance, the law implies that it shall be performed within a *reasonable time*.

2 *Parsons' Contracts*, p. 173, and cases cited in note.

16 *Pick.*, 227. 8 *Metcalf*, 97. 20 *Maine*, 67.

8 *Scott*, 544. 34 *Maine*, 357. 22 *Ala.*, 409.

12 *Ill.*, 72. 2 *Ala.*, 425. 1 *Story*, 332.

And so thoroughly settled is this principle that this implication will not be permitted to be rebutted by extrinsic testimony going

to fix a definite term, because this varies the contract (16 *Pick.*, 227) unless it be in connection with other facts as tending to show what is a reasonable time under the circumstances. 3 *Sumner*, 530. 3 *M. & W.*, 445. Since where the language of an instrument has a settled legal meaning, its construction is not open to evidence. Thus, a promise to pay money, no time being expressed, means a promise to pay it *on demand*; and evidence that payment at a future day was intended is not admissible. 13 *Metcalf*, 120. 8 *Johns.*, 189. But a *promise to do something other* than to pay money, no time being expressed, means a promise to do it within a reasonable time. (*Warren vs. Wheeler*, 8 *Metcalf*, 97.) And implications of the law of this character, originally arising on the general ground that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it, are as much parts of the contracts upon which they arise, as any of the express provisions of such contracts—so much so, indeed, that if the parties to the contract expressly therein provided (as they did in the case at bar) the very same thing which the law would have implied, this provision would be regarded as made twice, that is, by the parties and by the law, and as one of these is surplusage, that made by the parties is deemed to be so, since *expressio eorum quae tacite insunt, nihil operatur*.

What is a reasonable time is, generally, but not always, a question of law for the Court, but whether to be determined by the Jury or the Court, can only be determined upon all the facts and circumstances in the case.

2 *B. & C.* 270. 4 *B. & Ald.* 206.

3 *M. & W.* 445. 15 *Maine* 350.

3 *Sumner* 350. 24 *Maine* 131.

5 *Maryland* 131.

In 22 *Ala.* 409, *Drake v. Goree et al.*, which is a case upon a contract for the erection of a building, the Court say: "It is true that the contract has fixed no time within which the work specified is to be performed, but it does not follow that the performance may therefore be extended beyond the time fixed for the

payment of the money. The rule as established by this Court is, that when an act is to be done, and no time is prescribed for its performance, the law *requires it to be done within a reasonable time*, (2 Ala. 425, *Id.* 181,) and although the rule may be laid down rather too broadly, there can be no doubt that it is properly *applicable to all agreements for work of the character specified in the present contract.* * * * * * The undertaking of the defendants in error, as we have already seen, was to complete the work specified within a reasonable time; and although there may be cases in which the Court, in the construction of a written instrument, might properly determine a question of this character, there must also necessarily be many cases in which it would be impossible to arrive at any certain or definite conclusion. The contract may relate to the time required for the making of an article, the process of which is known only to those actually engaged in its manufacture; to a thousand matters of art or skill where truth is only to be obtained through the medium of experts; and in cases of this character is the Court blindly to grope its way to conclusions, for no other reason than because the construction of a written instrument is involved, or to obtain through testimony that information upon which alone it can decide understandingly. * * * * * In the present case, the work to be performed appertains to a trade; the specifications are in relation to matters which the Court cannot be presumed to have any knowledge of, and the question of reasonable time either to the delivery of the articles or the doing of work, is, generally speaking, *one of fact and to be determined* by the Jury under all the circumstances which surrounded the case at the time the contract was made." 1 Story 332.

The object of these citations as to the manner in which what is a "reasonable time" should be determined, is obvious.

The petitioner contends that, having averred that by the terms of the contract the work was to be commenced at once, and completed within a reasonable time; that during the spring, when the contract was made, was a reasonable time; and that the work was completed accordingly; and that for these reasons the time for completing the contract was not extended beyond three years;

and having in all other respects complied with the statute, therefore the requirements of the statute so far as the allegations of the Petition are concerned, were fully complied with—that consequently the Court below should have overruled the demurrer and ruled the defendants to answer the petition, and that a Jury should have been allowed to determine on all the facts and circumstances in the case, among other things, whether the allegations of the petitioner as to what constituted reasonable time in this case, were true, and if so, then as matter of fact, the petitioner (having brought himself within all the other provisions of the statute, which it is admitted here he did) would be entitled to his lien.

Is there then anything in the decisions in 21 and 22 Ill. incompatible or inconsistent with the position here assumed. The plaintiff in error contends that there is not. In the leading case of *Cook, et al. vs. Vreeland*, 21 Ill. 431, on page 436, the Court (Walker, J., delivering the opinion) say :

“It might be that if no time was fixed for the completion of the work, and nothing was said about when the money should be paid, that the law would *imply a promise to pay* when the labor shall be performed. But in such a case the lien could not *attach unless the contract provided a time within which the work was to be completed*. The law could not *imply any time for its completion*, and that must be left to express contract between the parties.”

It is true, that the law could imply no fixed, specific and definite time at or within which the work was to be completed, and in the absence of any averments in the petition under consideration in that case (*Cook v. Vreeland*) of a specified time for the completion of the work, or of any averment that the work (if no time was definitely specified) was to be done in a reasonable time and of what was such reasonable time, and that it was a time within the statutory limit, the Court might well declare that the petitioner's alleged lien would not attach. Certainly in the absence of these material averments the petitioner could not be aided by any implication of law. “The law” in such a case “could not,” in the language of the Court, “imply any time for its (the work's)

completion," but it is submitted that the Court did not thereby mean to assert that if upon the terms of a contract as alleged in a petition and upon the facts and circumstances surrounding the making and carrying out of the same, the law should raise a well settled and unvarying presumption as to the time of the completion of the work, to-wit, that it should be done in a reasonable time, which presumption or implication thereby became a part of the contract itself, and no more liable to contradiction than any other part of it, and if the averments of the petition reduced that legal presumption to a definite and specified period of time, that then and in that case the petitioner might not make his proof and the lien might not attach.

This Court was deciding, and properly, the case before it. It held that the petitioner should have made the averments necessary to bring him within the statute, and that he had not done so, and that the law could not therefore imply under such circumstances, a specific and definite time for the completion of the work on the contract there in question. The Court could not *mero motu*, straighten out a defective petition by legal intendment. But the Court did not hold that a petition with all the proper averments and where the petitioner relied upon what the law implied as to reasonable time, and upon the fact averred as to what a reasonable time was, could in no case be sustained. It is impossible to conceive how the Court could have decided differently than it did in the cases in *21st and 22d Ill.*, but it is equally difficult to see why this case, differing as it does, *toto celo* from them, should be decided in the same way. Thus in *Sansom v. Rhodes*, 8 Scott 544, which was an action by a purchaser to recover back money deposited by him, on the ground that the vendor had not deduced a good title to the property purchased by the 28th of November. It was held on special demurrer that the declaration was bad, for not averring that a reasonable time for deducing a good title had elapsed before the commencement of the action, the conditions of sale naming no *specific time* for that purpose,—and *Tindal, C. J.*, said, "There does not appear on the face of the declaration to have been any express stipulation that the vendor should deduce a good title by any specific time; and if

no express time was stipulated, the law *will in this case as in every other case, imply that a reasonable time* was intended. *Inasmuch, however, as it is not alleged in the declaration that a reasonable time* for deducing a good title had elapsed, I think the demurrer must prevail, and consequently the defendant is entitled to judgment."

Upon the same reasoning, the cases in 21st and 22d Ill., could not have been decided in any other way than they were, but if the averments had been different, it may be questioned whether the decisions would have been the same.

The case in 22 Ill. 252 *Senior vs. Brebnor*, decides that a Mechanics Lien can not be obtained on a contract which does not contain a provision that the work shall be completed within the period of three years. It is insisted that in the case at bar and under the averments of the petition, the contract did provide that the work should be completed within three years, inasmuch as the legal construction of the terms of the contract is, that the work was to be done in a reasonable time; which legal intentment was part and parcel of the contract, and the petition so declares it; and the petition further states what that reasonable time was, by which it appears to have been within three years, and finally alleges, that by reason of these facts, the time of completing the contract was not extended beyond three years. The statute simply makes the proviso that the completion of the work shall not be extended beyond three years, and our petition answered fully that proviso. It is submitted that the Court did not decide in *Senior vs. Brebnor* that the contract must contain *ipsissimis verbis* the provision that the work shall be completed within three years, but simply that it must contain such provisions as to time as would put it beyond question that the completion must be within three years. (*Vide cases in 21 Ill.*). Tested by this rule, our petition was sufficient.

The correctness of the proposition enunciated in the 21 and 22 Ill., that the statute in relation to mechanic's liens being in derogation of the common law, should be strictly construed, it is not proposed to deny, but it should at the same time be so construed as to carry out the objects for which it was enacted, and it

was probably under this idea that this Court, in 17 Ill. 425, say they "will give the act a liberal interpretation to preserve the rights of mechanics and material men." The language of the Supreme Court of Iowa (2 *Greene* 510) seems to present the correct course to be pursued in the construction of such a statute, and to exactly coincide with the views of this Court. It is there said: "The statute in relation to mechanic's liens being in derogation of the common law, should be strictly complied with. Unless those entitled to the lien created by the statute come within its provisions, they cannot obtain the aid for which it was enacted. The lien is purely statutory, and the manner of enforcing it is clearly defined, and while such a statute should receive a construction so as to make it effective and accomplish its object, the Legislature had in view, still *an essential departure* from its plain and obvious requirements will be fatal to those who attempt to enforce it."

Construing our statute, then, so as to make it effective and accomplish the object the Legislature had in view, while at the same time bearing in mind that the statute is in derogation of the Common Law, the plaintiff in error here is certainly entitled to a reversal of the judgment; for he brought himself within the statute in every essential particular. If the Petition, or the contract alleged in the Petition, in this case, showed "*an essential departure* from the plain and obvious requirements" of the statute, that would indeed be fatal to the Petitioner in his attempt to enforce his lien; but that is hardly to be contended.

If it be a correct position to assume that the statute should receive the construction here put upon it, that is, that it should be construed so as to carry out the intention of the Legislature in its enactment, it may become important to inquire, though it seems sufficiently plain, what that intention was.

In *Cook vs. Vreeland*, (21 Ill., 433,) the court say "the obvious intention of the Legislature was to dispense with precision in the contract, as to the kind of work to be performed and as to the specific amount to be paid, but to require the contract to fix and limit a time when the work should be completed and the money should be paid. And if *by the terms of the contract* the work was

to be performed within three years from the entering into the contract, and the money was to be paid, by the *express or implied agreement* under which it was to be performed, within one year after its completion, then and not till then, could the creditor, as between himself and the other party, avail himself of the benefit of the lien."

The court here say that the Legislature intended "to fix and limit a time when the work should be completed and the money paid." Exactly so, but *how* was this time to be fixed and limited? Was it required to be done by the express stipulation of the parties, fixing a *specific* and *definite* day and year? or might it not be fixed and limited by inexorable implication of law? This court gives the answer to this question. "If," it goes on to say, "by the *terms of the contract* the work was to be performed within three years, &c., and the money was to be paid, by the *express or implied agreement* under which it (i. e. the work) was to be performed, within one year, &c.," that would be a compliance with the statute. The court here speaks of the *implied agreement* under which the work was to be performed, conclusively showing, as Petitioner's counsel believe, that the court had in view the precise state of facts presented in this case, that is to say, an agreement for the performance of the work where the law fixed and limited that it should be done in a reasonable time, and the petitioner averred what such reasonable time was, and that was within the statutory limit. This is such an implied agreement as the court seems to have contemplated in what it there says. Under the implication of the law, the work was to be completed *within three years by the terms of the contract*, for that implication formed, as we have seen, as much a part of those terms as any distinct stipulation would have done.

The agreement *ab inconvenienti* naturally enough suggests itself in this case, but care has been used to present no considerations but what result from a strict application of the law and construction of the statute. It is however a legitimate argument to urge upon the court in conclusion, the general facts presented in the case at bar. The contract was not for the erection of a building, but for the plastering of, and building the chimneys in,

a building. It was entered into just as the carpenters were completing their work. It was made upon the express understanding (and implied agreement) that the work should be commenced at once and finished immediately. It was made under such surrounding circumstances as effectually exclude any hypothesis but that of the immediate and rapid completion of the work. It was to be finished "in a reasonable time," and the rule of law is that "that is a reasonable time which preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer;" and under that rule the work must necessarily be done at once. According to no process of reasoning, under no rule of law, and by not even the strictest construction of the statute, could this contract be so construed as to extend the time of the completion of the work beyond the statutory limit; and it is submitted that upon principle and authority the Petition in question was sufficient in law to entitle the Petitioner to his lien.

MELVILLE W. FULLER,

Of Counsel for Plff in Error.

State of Illinois } In the Supreme Court
Madison County } ss } April Term A.D. 1869

Philip Maser
vs
Jacob Matt and
William Metzger } Petition for
Mechanics Lien

This cause is presented
to the Court upon one point only,
There is but one error assigned,
That is the sustaining of the demurrer
to the petition for a Mechanics Lien.
filed in this cause. The petition
sets forth that the plaintiff Maser
made a contract to plaster a certain
building that the defendants
Matt were then building in
the City of Chicago, and that
the same was to be completed
within a reasonable time.

The defendants say to this
petition, that the petition is not
sufficient, and if the contract
is as they set forth in the
petition, then no lien would
lie thereon, because a contract
that does not set forth the time of
the making of it, and the time when

the work is to be completed, together
with the price to be paid and the
time of payment is not sufficient,
and we understand it the same
question has already been decided
by this Court in Cases, of Cook
vs Ireland & Co, &c, 21, 22, 431,
and reaffirmed in fact in
the 22, 23, on page 252, Case of Lewis
vs Kenner & Co

We therefore submit the
case to the Court upon our
part without further comment,

C. H. Remy
Att'y for Defts,

Supreme Ct. of Illinois
Philip Masses
^{vs}
Jacob Matt and
William Metzger
arguments submitted

E. F. Renshaw
Sept 20th 50

IN THE SUPREME COURT,

APRIL TERM, A. D. 1860.

PHILIP MOSER

vs.

JACOB MATT AND

WILLIAM METZGER.

ABSTRACT OF THE RECORD.

2 Præcipe filed, April 30, 1859, and petition setting forth that on
3 March 1, 1858, petitioner made a contract with Jacob Matt, who was the
 owner of the lot therein mentioned, to furnish materials and to do work,
 plastering and building chimnies, toward erecting a three story house on
 sub-lot 3, lot 5, block 60, Canal Trus. Subd. of N. W. qr. sec. 21, T. 39,
 N., R. 14 E.

4 That by terms of contract, Moser was to do all plastering, two coats,
 and build all chimnies. That at the time of making the contract, no
 specific time was fixed within which the work was to be completed, but
 avers that it was perfectly understood between the parties that the work
 was to be done at once, that the frame was then erected, and the carpen-
 ters were at work finishing the same, and that the said work was, by the
 reasonable construction of said contract, to be commenced as soon as the
 house was ready to be plastered, and to be finished within a reasonable
 time. That during the same spring was reasonable time, and that work
 was done within three months from making of the contract.

5 That said Matt agreed with petitioner to pay twenty-three cents per
 yard for plastering, and seventy-five cents per foot for chimnies, and
 that amount due should be paid to pet'r in six months after completion

of the work. That petitioner completed the work on May 15, 1858, and
accepted by Matt. That petitioner did 1562 yards of plastering, and
6 built 75 feet of Chimnies, and said Matt owed petitioner, under contract,
\$432.01.

Petitioner avers, time for completing contract was not extended over
three years, nor time of payment over one year from completion of con-
tract. That Matt has paid on the contract \$204.95, and that is still due
petitioner on the contract, \$227.06, with interest from Nov. 15, 1858.
That one William Metzger pretends to have some claim or interest in
the premises.

7 Prayer in usual form that amount be declared a lien and premises
sold to satisfy the same, and for other relief, &c.

9 Summons, in usual form, to sheriff Cook County same date.

10 Sheriff's return, May 3, 1857, served by reading and copy.

March 15, 1860, general demurrer by defendants to petition.

11 Joinder in demurrer by petitioner. Judgment by Court for defen-
dants on demurrer, and petition dismissed at petitioner's costs.

12 Clerk's certificates to transcript in usual form.

ERRORS ASSIGNED.

13 That Court erred in sustaining the demurrer of defendants to the
petition, and in dismissing the petition.

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Sol'rs for Petitioner.

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Moser

or

Matt et al

Abstract

220

1860

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APRIL TERM, A. D. 1860.

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M. W. FULLER,

GEO. F. CROCKER,

Sol'rs for Petitioner.

Moser
or
Muttetal

Abstract

13057

United States of America
State of Illinois Cook County SS

Plas before the Honorable the Judges of the Superior Court of Chicago within and for the County of Cook and State of Illinois at a regular term of said Superior Court of Chicago begun and holden at the Court House in the City of Chicago in said County and State on the First Monday being the fifth day of March in the year of Our Lord eighteen hundred and sixty and of the Independence of the United States of America the eighty fourth

Present the Hon. John M Wilson Chief Justice

Of the Superior Court of Chicago

Van. H. Higgins^{2d} and Grant Goodrich Judges

Carlos Haven Prosecuting Attorney

John. Gray, Sheriff of Cook County

Attest

Walter Kimball Clerk

Be it remembered that heretofore to wit on the thirtieth day of April A.D. Eighteen Hundred and fifty nine came Philip Moser plaintiff by his attorneys Crocker & King and filed in the office of the Clerk of the Superior Court of Chicago his certain Recipe for Summons and Petition for Mechanics Lien in words and figures following to wit

State of Illinois } ss
County of Cook }

Superior Court
of the City of Chicago
June Term A.D. 1859

Philip Moser

vs

Jacob Math

William Metzger

Pet for Mech's Lien

The Clerk of said Court will
issue a Summons in the above cause directed to the
Sheriff of Cook County to answer petition for
Mechanics Lien returnable at the June Term of
said Court, A.D. 1859

Crocker & King Plaintiffs Attys
To Walter Kimball Esq. Clerk
Chicago April 28th 1859

The Superior Court of Chicago
Of the June term A.D. 1859

To the Honorable Judges of the Superior Court
of Chicago

Your petitioner Phillip Moser a mechanic
to wit a plasterer and mason of Chicago in the
County of Cook and State of Illinois most respec-
tfully represents unto this Honorable Court that on
or about the first day of March A.D. 1858 one
Jacob Matt of the said City of Chicago who was
at that time the owner of the tract or lot of land
herein below described entered into a verbal con-
tract with your petitioner to furnish work and
labor and materials for and towards erecting
a three story frame house to wit, to do the
plastering and building chimneys in a certain
house which the said Jacob Matt was then buil-
ding on Sub Lot Three in Lot number Five in Block
number sixty of the Canal Trustees subdivision of
the North West quarter of Section Twenty one in
Township thirty nine North of Range fourteen
East of the third principal meridian in the City of
Chicago in the County of Cook and State of Illinois
that by the terms of said contract the said
petitioner was to do all the plastering work therein
putting on two coats of plastering and to build
all the chimneys desired by said Jacob Matt in

and about the erecting said house. Your petitioner further shews unto your Honor that at the time of the making the said contract no specific time was fixed within which the said work was to be completed but avers that it was perfectly understood between the parties, that the work mentioned in said contract was to be done at once that the frame of the house was then erected and the carpenters were at work finishing the same and that the said work was by the reasonable construction of said contract to be commenced as soon as the house was ready to be plastered and to be finished within a reasonable time thereafter, and petitioner further shows unto your Honor that during the same spring and summer when the contract was made was a reasonable time and that to have delayed the completion of said work for a longer time than six or eight months from the time of making the said contract would have been unreasonable and absurd and that the said work was completed within three months from the making of the contract.

Petitioner further alleges that for and in consideration of the work and labor to be done and materials to be furnished by your petitioner in and about the erecting the said house as aforesaid the said Jacob Mats promised and

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agreed to and with your petitioner to pay him therefor the sum of twenty three cents for each and every yard of plastering so to be done by your petitioner as aforesaid in and about the said house and also agreed to pay your petitioner the sum of seventy five cents for each and every foot of chimney that should be built by your petitioner under said verbal contract; and that the amount that should be due to petitioner for said work and labor should be paid to him in six months, after the completion of said work and labor and the performance of said contract by your petitioner.

Your petitioner ^{further} sheweth that he thereupon proceeded with the performance of his said contract and fully completed the same on or about the fifteenth day of May A.D. 1858 and that the same was there and then accepted by the said Jacob Matt as completed under the said contract.

Your petitioner further sheweth that the amount of plastering done by him in performance of his said contract, with two coats of plastering was fifteen hundred and sixty two square yards: and that the amount of chimneys built by him under said contract, was seventy five feet and that under and by the said verbal contract of the said Jacob Matt your petitioner was thereupon entitled to receive from the

said Jacob Matt for the plastering so done by him as aforesaid the sum of three hundred and fifty nine Dollars and twenty six cents and for the chimneys so built by him as aforesaid the sum of seventy two Dollars and seventy five cents, making in all the sum of four hundred and thirty two Dollars and one cent.

Your petitioner further sheweth unto your Honor that by the terms of said contract the time for completing the same was not extended for a longer period than three years nor the time of payment beyond the period of one year from the time stipulated for the completion thereof.

Your petitioner further sheweth that the said Jacob Matt has paid to him for work done under said contract the sum of Two hundred and four dollars and ninety five cents and that there is now due and payable and unpaid under said contract to your petitioner the sum of Two Hundred and twenty seven Dollars and six cents with interest thereon from the fifteenth day of November A.D. 1858 which the said Jacob Matt neglects and refuses to pay.

Your petitioner further shows that William Metzger pretends to have some claim or interest in said premises but your petitioner is not advised of the nature thereof, and therefore prays that he may be made a party defendant to this

petition.

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Wherefore your petitioner prays that the said Jacob
Math and William Metzger may be summoned to
answer this his petition and that the said
amount so due to your petitioner may be decreed
to be a lien on the said above described premis-
es and appurtenances and that your petitioner
may have a judgment against the said Jacob
Math for the amount ~~of~~ due from him to
your petitioner under said contract and that
the said premises may be ordered to be sold to
satisfy the same and that the said William
Metzger and Jacob Math may be barred and
foreclosed of and from any and all interest
or claim on said premises and that your
petitioner may have such other and further
relief as the nature of the circumstances of
the case may require and to this Honorable
Court shall seem meet and your petitioner
as in duty bound will ever pray

Crocker & King
Solicitors for Petitioner

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And thereupon accordingly on the said thirtieth day of April A.D. Eighteen Hundred and fifty nine there issued out of and under the seal of said Court the Peoples writ of Summons to the Sheriff of Cook County. Which said summons with the Sheriff's Return ^{thereon} endorsed are in words 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 Jacob Matt and William Metzger if they shall be found in your County personally to be and appear before the Superior Court of Chicago of said County, on the first day of the term thereof, to be holden at the Court House in the City of Chicago in said County, on the first Monday of June next to answer unto Philip Moser in his certain petition for Mechanic's Lien filed in said Court.

And have you then 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 30th day of April A.D. 1859

Walter Kimball
Clerk

(10)

Served by reading & delivering a copy of this writ to
the within named defendants the 3rd day of May
1859

John Gray Sheriff
By F. Lumbard Deputy

Services 2 1.00 Copies 2 1.00 Miles 5.25 Return 10
Total \$2.35

And afterwards to wit on the fifteenth day of March
(being one of the days of the said March Term of said
Court) in the year of Our Lord one thousand eight hund-
ed and sixty came Jacob Matt et al defendants by E.
F. Runyon their solicitor and filed in said cause their
Demurer to said Petition which said Demurer is as
follows to wit.

Jacob Matt et al
at
Philip Moser

Superior Court of Chicago
Of the March Term 1860
Mechanic's Lien

Now comes the said defendants by
E. F. Runyon their Attorney and defend the wrong
and injury &c. and say that the matters & things
in said petition as therein set forth are not suf-
ficient in law, and that they are not bound to
answer the same. they therefore pray judgment &c

E. F. Runyon
Deft Atty

and the said petitioner says that the said petition
is sufficient in law and prays judgment

Geo F Crocker Compls Sol

And afterwards to wit on the fifteenth day of
March (being one of the days of the said March Term
of said Court) in the year of Our Lord One Thousand
eight hundred and sixty the following among
other proceedings was had and entered on record
in said Court to wit

Philip Moser

vs

Petition for Mechanics Lien

Jacob Matt and William Metzger

This day comes said Petitioner by Crocker & Hoing his
solicitors and said defendants by Brown & Bunyon
their Attorneys also come and counsel being heard
on defendants demurer to the petition filed in this
cause and due deliberation being thereupon had and
the premises being fully understood it appears
to the Court that the demurer herein pleaded in
bar to the Petition in this cause is sufficient in
law to bar said petitioner from having and main-
taining his action against said defendants the
demurer to Petition is therefore sustained and
suit dismissed at costs said Petitioner.

Therefore it is considered that said defendants do
have and recover of said Petitioner their costs

and charges about their defence in this behalf expended
and have execution therefor.

State of Illinois
County of Cook } ss.

J. Walter Kimball Clerk of
the Superior Court of Chicago in and for said County
do hereby certify that the foregoing is a full true and
correct Transcript of all the papers on file in my office
and of the proceedings and judgment entered of
Record in said Court in the case wherein Philip Moser
is Petitioner and Jacob Matt. and William Metzger
defendants.

In testimony whereof I hereunto subscribe
my name & affix the Seal of said Court
at the City of Chicago in said County
this 22nd day of March A.D. 1860.

Walter Kimball Clerk



Philip Moser
vs
Jacob Math. &
William Metzger

Supreme Court of Illinois
April Term 1886

And now comes the Plaintiff
in Error and says that the Court below
committed error in this cause and
assigns the following grounds of Error
That Court erred in ~~den~~ sustaining
the ~~petition~~ of demurrer to the Petition
in this cause, and in dismissing the suit

George A. Crocker &
M. W. Fuller. Solicitors for Petitioner

And the defendants in error
say that no error was committed in
said cause

G. F. Runyan
Sept 20th

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~~Solomon S. Skitt~~

~~H. M. Painter.~~

Moses
Mattetal

Rec'd April 18, 1860
L. Leland
Clerk

Rec'd \$3-

\$3-
Paid by Jeffery
M. Kimball