

8830

No. _____

Supreme Court of Illinois

Lucas & McClerkin

vs.

Logan & Edmiston

71641  7

IN THE SUPREME COURT, STATE OF ILLINOIS,
For the 1st GRAND DIVISION,
November Term, 1857.

JAMES L. MCCLURKEN and HARVEY B. LUCAS, *Pltff's in Error,* }
vs.
 JAMES LOGAN and JOEL A. EDMISTON, *Def'd'ts in Error.* }

Error to
WASHINGTON.

ABSTRACT OF PLAINTIFFS' CASE.

PAGE 1 This was a Petition for Mechanic's Lien, filed by the defendant against the plaintiffs
 2 in error, in the Washington Circuit Court, at the October Term thereof, 1854, and on the
 10th day of July, 1854, a summons issued from said Court against plaintiffs in error, to
 5 answer a petition filed by James Logan, Thomas B. Afflack and Joel A. Edmiston, to enforce
 a Mechanic's Lien, which was returned served on the defendants. At the same Term, the
 petitioners asked leave to withdraw the petition, which was allowed, and the cause was
 9 continued to the next Term of the Court.

12 At the May Term, 1855, of said Court, the petitioner, Logan alone, filed another peti-
 tion to enforce a Mechanic's lien against the same defendants—which petition states that
 the petitioner made a contract with defendant McClurken to perform certain work and
 labor on a Woolen Factory and the machinery therein, for which said McClurken promised
 to pay petitioner \$1,50 per day for as many days as he should work on said building, and
 to board petitioner besides, and that petitioner worked thirty-two and one-half days, or
 thereabouts, for said McClurken, and that his board was worth during that time, \$2,50
 per week—making in the aggregate, the sum of \$60,35 due petitioner; that petitioner re-
 12 ceived \$5,35 on account from said McClurken, which left a balance of \$55,00 due him.—
 That said buildings and machinery are situated upon certain lands in the County of
 Washington, described in petition.—That said lands were originally owned by Thurman
 and one Gunn, who conveyed the same to Shipley & Barber—who conveyed the same to
 McClurken; and, that afterwards, said Harvey B. Lucas, who was made a defendant to
 the petition, attempted to take and hold possession of the premises, without having any
 title known to petitioner—but which, if said Lucas ever had, was never recorded, and is
 therefore void. The petition then prays that the said premises be sold to satisfy the de-
 mand of said Logan.

13 At the October Term, aforesaid, of said Court, one Afflack obtained leave to interplead,
 and filed his petition accordingly, and afterwards, at the May Term, 1855, of said Court,
 said petition of said Afflack, in the nature of a bill of interpleader, was dismissed.

6 At the May Term, 1855, Harvey B. Lucas, one of the plaintiffs in error, and defend-
 ant in the Court below, filed his answer without oath, in which he states that he knows
 nothing of the accounts between the defendant in error, Logan, and the plaintiff in error,
 McClurken, but sets forth a legal title to the premises and possession of the same, before
 he obtained title to the same.

7 The defendant, McClurken, did not, in fact appear, either by himself or Attorney, but
 the defendant, Lucas, appeared by Bond & White and filed the above answer.

21 At the May Term, 1855, of said Court, the defendants in error obtained a reference
 to the Master, to take the proofs and make compensation. It further appears, from the
 Record that, before plaintiff in error, Lucas, answered petition, he interposed a demurrer
 to petition, which was overruled, and no notice is taken of the answer of Lucas in the
 record.

The petitioners' account is appended to the report of the Master, and appears to be
 6 incorporated in the record, but is not marked "filed;" nor does the demurrer or the
 7 answer of Lucas appear to be marked "filed." Master reports the evidence of Robert H.
 Grant, who proves contract between McClurken and Logan only, and Miles B. Thurman,
 16 who proves Lucas & McClurken's title to the premises, by parol: also, Thomas B. Afflack's
 17 evidence, who proves that Logan made contract for boarding, boarded with, and paid
 18 him; and also, that Lucas controlled the property after the work was done on it. James
 I. Logan also testified, as appears from Master's report, that Edmiston worked on the
 19 building, in petition mentioned, some eighteen days, and that such work was worth from
 \$1,50 to \$1,87½ per day.

The Master did not certify the evidence to the Court, but reported that from the
 statements of the witnesses, aforesaid, the plaintiff in error, McClurken, was indebted to
 18 the defendant in error, Logan, in the sum of \$48,37½ for work, and \$11,60 for board, and
 19 that he was indebted to Edmiston in the sum of \$27; whereupon, the Court rendered a
 judgment in favor of said Logan, for \$60,35, and in favor of Edmiston for \$23,25, against
 21 the premises, in said petition described, and ordered said premises to be sold, and that a
 22 special execution issue therefor.

The cause is now brought into this Court and is sought to be reversed for the following errors assigned upon the record, to wit: 1st. Because the said Court rendered a judgment in favor of defendant in error, Joel A. Edmiston, without any petition being previously filed by him, and without his being made a party plaintiff as required by the Statute in regard to mechanics' liens. 2nd. Because the said Court overruled the demurrer of the plaintiff in error, Lucas, to petition filed by defendant in error, Logan. 3rd. Because the said Court erred in allowing the petition of said Logan to be withdrawn and continuing cause. 4th. Because the said Court ordered a reference to the Master to take proofs, instead of setting the cause down to be heard upon bill and answer, as to said plaintiff in error, Lucas, there being no replication filed by petitioner Logan as required by law. 5th. Because the Court ordered a reference to the Master to take evidence, without any summons or process being served upon the plaintiff in error, McClurken, in the suit commenced by said Logan. 6th. The Court rendered a judgment against the plaintiff in error, McClurken, without any process being served on him, or appear and by him. 7th. The said Court rendered a judgment upon the report of the Master, when the cause was not referred to the Master to report, but to take the evidence and make compensation. 8th. The Court rendered a judgment against the plaintiff in error, McClurken, without taking any rule against him to answer, or without the said McClurken being in default. 9th. The Court rendered judgment against the plaintiffs in error without any process being served upon either of them—in the suit commenced by said Logan against the plaintiffs in error. 10th. The Court erred in rendering a judgment in favor of the defendant in error, Logan, against the plaintiff in error in a suit for mechanic's lien, for board and lodging, and for hauling. 11th. The Court erred in receiving oral testimony of title in the plaintiffs in error to the premises in petition described; which are the grounds of error relied on by the plaintiffs in error to reverse the judgment of the Circuit Court of Washington County.

NELSON & JOHNSON, *for Plaintiffs in Error.*

Ms C. 1. 1. 1. 1. 1.

Logan

230

McLean & Johnson
per my
J. J. Weeks
per my
J. J. Weeks
per my
J. J. Weeks

DEFENDANTS Points. The first error is disposed of by the statement in the decree pg 21 of Record—by the title of the def't demurrer pg 7, and by the clerk's return to the certiorari herein.

The second error is not well assigned the decision of court below being proper in overruling demurrer, petition was sufficient.

Vide Revised Statutes pg 345 sec 4.

The third error assigned is an error was waived by after demurring to amended bill, without objection. Still if not waived it was to pl'ffs advantage and not to his prejudice, as compt's now ordered to pay costs.—bill pg 21 & 22 of Record.

The fourth error is improvidently assigned. There was no answer filed the paper not sworn to is not answered, or have given so to file, nor issue made up. But the reference was at once on overruling demurrer, Def't as shown by record not withdrawing his Demurrer or asking leave to answer.

The fifth error is improvidently assigned because both def'ts answered by demurrer as shown by the record and the decree but assumed this error is released by McClurkin.

The sixth is answered same as the fifth.

The seventh assignment is without point.

The eighth error is answered the same as the fifth error.

The ninth error is answered by the appearance of both def'ts and filing demurrer and by Sheriff's return.

The tenth error is improvident for the reason that judgment was given in demurrer, when it is shown in the bill and admitted by demurrer that the contract for hire of Logan was to pay him \$1.50 per day, and board, the board thus being part pay for work done; there is no item for hauling by Logan or Edmanston. See last half of P. 15, and first of 16.

The eleventh error is improvident—the judgement being on demurrer the title stated in the bill is admitted and no proof was required. Still record proof was made by the pl'tffs filed herein.

And so def'ts say there is no error now shown by the record of this court.

HAYNIE, ALLEN & PARISH, for Def'ts.

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND
DIVISION—NOVEMBER TERM, 1859.

LUCAS & McCLERKIN, }
Page vs. Error to Washington.
Rec. LOGAN & EDMISTON. }

1 On the 1st day July, 1854, Logan filed his bill to enforce mechanics lien vs. McClerkin & Lucas—for Oct term 1854.

5. On 10th July summons issued, on 15th, served on both. At the Oct. term 1854, deft demurred to said petition; demur sustained; leave given to (21) amend, and also leave to interplead by Edmunson & Afflack, and then answer filed, and then leave granted to withdraw petition and cause continued.

7. See demurrer filed to first petition—entitled 'McClerkin & Lucas ats. Logan, Afflack & Edmiston.'

9. On 2d May, 1855, comp't. Logan filed his bill.

7. To this bill the 'Defendants' by 'R. S. Bond', for def'ts, filed a demurrer entitled of 'May term 1855,' but said demurrer was not marked filed.

21. At May term 1855, the order of the court was made thus: 'on Friday comes the compl't. Jas T Logan and Joel A Edmiston (who obtained leave to interplead and who was made a party to this proceeding by bill of interpleader &c, and def'ts, by R S Bond, their att'y, filed demurrer which was overruled and the cause was then referred to the master to take evidence.

21. On Saturday master's report filed and it was ordered that judgment be rendered for Logan for \$60 35, and for Edmiston for \$23 25 against the lands &c and that special fi fa issue to sell &c the lands described in the order and petition—proceeds to pay Logan first, 2d Edmiston and all cost, remainder to be paid to Lucas—costs of last term (oct '54) to be paid by Logan & Edmiston.

13. There is a bill of interpleader in this record filed by Afflack &c as appears by the order of comp't. on pg 21 of Record, this was dismissed. There is no copy of Edmiston's bill sent up, but the order shows he was made a party by bill of interpleader.

7. The demurrer is entitled ats. Logan & Edmiston—and the return of the clk to the certiorari shows that the bill of interpleader was filed but now can not be found.

6. There is what purports to be an answer by Lucas, but it is not marked filed, neither is it noticed in the order of court, nor did Lucas ever withdraw his demurrer, or ask how to do so, nor is there any replication to the same, nor is said answer under oath although the oath is not waived, as is required by Revised Statutes, pg 346 sec 7.

16-17-18-19. Report of master 'Vance' of evidence and finds that McClerkin owes Logan \$60 35 and Edmiston \$27 00.

By Logan's bill, see pg 11, he admits payment of five dollars thirty-five cts and claims balance due \$55 00.

For errors assigned, see pl'ff error's abstract.

Def'ts in error filed two pleas: as follows:

1st. That pl'ff in error, McClerkin, on 17th Dec 1857, made his written release, thereby waiving and releasing all errors in the cause in the court below.

2d. That on 23d of Jan 1858, after the suing out of a writ of error in this cause, pl'ff in error, McClerkin, by his instruments of writing under his seal, did release remit said def'ts in error all errors which had been made or committed by the Circuit Court.

12

Incarnated

as

Loganville

8830

DIAMETER - 10.47 INCHES
SERIAL OF 1111010 - 11 THE FINEST COGNAC

IN THE SUPREME COURT, STATE OF ILLINOIS.

For the 1st GRAND DIVISION,

November Term, 1857.

JAMES L. McCLURKEN and HARVEY B. LUCAS, *Pl'tff's in Error*,

vs.

JAMES LOGAN and JOEL A. EDMISTON, *Def'd's in Error*.

Error to
WASHINGTON.

ABSTRACT OF PLAINTIFFS' CASE.

PAGE 1 This was a Petition for Mechanic's Lien, filed by the defendant against the plaintiffs
2 in error, in the Washington Circuit Court, at the October Term thereof, 1854, and on the
10th day of July, 1854, a summons issued from said Court against plaintiffs in error, to
5 answer a petition filed by James Logan, Thomas B. Afflack and Joel A. Edmiston, to enforce
a Mechanic's Lien, which was returned served on the defendants. At the same Term, the
petitioners asked leave to withdraw the petition, which was allowed, and the cause was
9 continued to the next Term of the Court.

12 At the May Term, 1855, of said Court, the petitioner, Logan alone, filed another petition
to enforce a Mechanic's lien against the same defendants—which petition states that
the petitioner made a contract with defendant McClurken to perform certain work and
labor on a Woolen Factory and the machinery therein, for which said McClurken promised
to pay petitioner \$1,50 per day for as many days as he should work on said building, and
to board petitioner besides, and that petitioner worked thirty-two and one-half days, or
thereabouts, for said McClurken, and that his board was worth during that time, \$2,50
per week—making in the aggregate, the sum of \$60,35 due petitioner; that petitioner received
12 \$5,35 on account from said McClurken, which left a balance of \$55,00 due him.—
That said buildings and machinery are situated upon certain lands in the County of
Washington, described in petition.—That said lands were originally owned by Thurman
and one Gunn, who conveyed the same to Shipley & Barber—who conveyed the same to
McClurken; and, that afterwards, said Harvey B. Lucas, who was made a defendant to
the petition, attempted to take and hold possession of the premises, without having any
title known to petitioner—but which, if said Lucas ever had, was never recorded, and is
therefore void. The petition then prays that the said premises be sold to satisfy the demand
of said Logan.

13 At the October Term, aforesaid, of said Court, one Afflack obtained leave to amend
and filed his petition accordingly, and afterwards, at the May Term, 1855, of said Court,
said petition of said Afflack, in the nature of a bill of interpleader, was dismissed.

6 At the May Term, 1855, Harvey B. Lucas, one of the plaintiffs in error, and defendant
in the Court below, filed his answer without oath, in which he states that he knows
nothing of the accounts between the defendant in error, Logan, and the plaintiff in error,
McClurken, but sets forth a legal title to the premises and possession of the same, before
he obtained title to the same.

7 The defendant, McClurken, did not, in fact appear, either by himself or Attorney, but
the defendant, Lucas, appeared by Bond & White and filed the above answer.

21 At the May Term, 1855, of said Court, the defendants in error obtained a reference
to the Master, to take the proofs and make compensation. It further appears, from the
Record that, before plaintiff in error, Lucas, answered petition, he interposed a demurrer
to petition, which was overruled, and no notice is taken of the answer of Lucas in the
record.

The petitioners' account is appended to the report of the Master, and appears to be
6 incorporated in the record, but is not marked "filed;" nor does the demurrer or the
7 answer of Lucas appear to be marked "filed." Master reports the evidence of Robert H.
Grant, who proves contract between McClurken and Logan only, and Miles B. Thurman,
16 who proves Lucas & McClurken's title to the premises, by parol; also, Thomas B. Afflack's
17 evidence, who proves that Logan made contract for boarding, boarded with, and paid
18 him; and also, that Lucas controlled the property after the work was done on it. James
I. Logan also testified, as appears from Master's report, that Edmiston worked on the
19 building, in petition mentioned, some eighteen days, and that such work was worth from
\$1,50 to \$1,87½ per day.

The Master did not certify the evidence to the Court, but reported that from the
statements of the witnesses, aforesaid, the plaintiff in error, McClurken, was indebted to
18 the defendant in error, Logan, in the sum of \$48,37½ for work, and \$11,60 for board, and
19 that he was indebted to Edmiston in the sum of \$27; whereupon, the Court rendered a
judgment in favor of said Logan, for \$60,35, and in favor of Edmiston for \$23,25, against
21 the premises, in said petition described, and ordered said premises to be sold, and that a
22 special execution issue therefor.

The cause is now brought into this Court and is sought to be reversed for the following errors assigned upon the record, to wit: 1st. Because the said Court rendered a judgment in favor of defendant in error, Joel A. Edmiston, without any petition being previously filed by him, and without his being made a party plaintiff as required by the Statute in regard to mechanics' liens. 2nd. Because the said Court overruled the demurrer of the plaintiff in error, Lucas, to petition filed by defendant in error, Logan. 3rd. Because the said Court erred in allowing the petition of said Logan to be withdrawn and continuing cause. 4th. Because the said Court ordered a reference to the Master to take proofs, instead of setting the cause down to be heard upon bill and answer, as to said plaintiff in error, Lucas, there being no replication filed by petitioner Logan as required by law. 5th. Because the Court ordered a reference to the Master to take evidence, without any summons or process being served upon the plaintiff in error, McClurken, in the suit commenced by said Logan. 6th. The Court rendered a judgment against the plaintiff in error, McClurken, without any process being served on him, or appear and by him. 7th. The said Court rendered a judgment upon the report of the Master, when the cause was not referred to the Master to report, but to take the evidence and make compensation. 8th. The Court rendered a judgment against the plaintiff in error, McClurken, without taking any rule against him to answer, or without the said McClurken being in default. 9th. The Court rendered judgment against the plaintiffs in error without any process being served upon either of them—in the suit commenced by said Logan against the plaintiffs in error. 10th. The Court erred in rendering a judgment in favor of the defendant in error, Logan, against the plaintiff in error in a suit for mechanic's lien, for board and lodging, and for hauling. 11th. The Court erred in receiving oral testimony of title in the plaintiffs in error to the premises in petition described; which are the grounds of error relied on by the plaintiffs in error to reverse the judgment of the Circuit Court of Washington County.

NELSON & JOHNSON, for Plaintiffs in Error.

DEFENDANTS Points. The first error is disposed of by the statement in the decree pg 21 of Record—by the title of the def't demurrer pg 7, and by the clerk's return to the certiorari herein.

The second error is not well assigned the decision of court below being proper in overruling demurrer, petition was sufficient.

Vide Revised Statutes pg 345 sec 4.

here
The third error assigned is an error was waived by after demurring to amended bill, without objection. Still if not waived it was to pl'ffs advantage and not to his prejudice, as compt's ~~now~~ ordered to pay costs.—bill pg 21 & 22 of Record.

The fourth error is improvidently assigned. There was no answer filed the paper not sworn to is not answered, or have given so to file, nor issue made up. But the reference was at once on overruling demurrer, Def't as shown by record not withdrawing his Demurrer or asking leave to answer.

The fifth error is improvidently assigned because both def'ts answered by demurrer as shown by the record and the decree but assumed this error is released by McClurkin.

The sixth is answered same as the fifth.

The seventh assignment is without point.

The eighth error is answered the same as the fifth error.

The ninth error is answered by the appearance of both def'ts and filing demurrer and by Sheriff's return.

The tenth error is improvident for the reason that judgment was given in demurrer, when it is shown in the bill and admitted by demurrer that the contract for hire of Logan was to pay him \$1.50 per day, and board, the board thus being part pay for work done; there is no item for hauling by Logan or Edmunston. See last half of P. 15, and first of 16.

The eleventh error is improvident—the judgement being on demurrer the title stated in the bill is admitted and no proof was required. Still record proof was made by the pl'tffs filed herein.

And so def'ts say there is no error now shown by the record of this court.

HAYNIE, ALLEN & PARISH, for Def'ts.

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND
DIVISION—NOVEMBER TERM, 1859.

LUCAS & McCLERKIN, }
Page vs. Error to Washington.
Rec. LOGAN & EDMISTON. }

1 On the 1st day July, 1854, Logan filed his bill to enforce mechanics lien vs. McClerkin & Lucas—for Oct term 1854.

5. On 10th July summons issued, on 15th, served on both. At the Oct. term 1854, deft demurred to said petition; demur sustained; leave given to (21) amend, and also leave to interplead by Edmunson & Afflack, and then answer filed, and then leave granted to withdraw petition and cause continued.

7. See demurrer filed to first petition—entitled 'McClerkin & Lucas ats. Logan, Afflack & Edmiston.'

9. On 2d May, 1855, comp't. Logan filed his bill.

7. To this bill the 'Defendants' by 'R. S. Bond, for def'ts, filed a demurrer entitled of 'May term 1855,' but said demurrer was not marked filed.

21. At May term 1855, the order of the court was made thus: 'on Friday comes the comp't. Jas T Logan and Joel A Edmiston (who obtained leave to interplead and who was made a party to this proceeding by bill of interpleader &c, and def'ts, by R S Bond, their att'y, filed demurrer which was overruled and the cause was then referred to the master to take evidence.

21. On Saturday master's report filed and it was ordered that judgment be rendered for Logan for \$60 35, and for Edmiston for \$23 25 against the lands &c and that special fi fa issue to sell &c the lands described in the order and petition—proceeds to pay Logan first, 2d Edmiston and all cost, remainder to be paid to Lucas—costs of last term (oct '54) to be paid by Logan & Edmiston.

13. There is a bill of interpleader in this record filed by Afflack &c as appears by the order of comp't. on pg 21 of Record, this was dismissed. There is no copy of Edmiston's bill sent up, but the order shows he was made a party by bill of interpleader.

7. The demurrer is entitled ats. Logan & Edmiston—and the return of the clk to the certiorari shows that the bill of interpleader was filed but now can not be found.

6. There is what purports to be an answer by Lucas, but it is not marked filed, neither is it noticed in the order of court, nor did Lucas ever withdraw his demurrer, or ask how to do so, nor is there any replication to the same, nor is said answer under oath although the oath is not waived, as is required by Revised Statutes, pg 346 sec 7.

16-17-18-19. Report of master 'Vance' of evidence and finds that McClerkin owes Logan \$60 35 and Edmiston \$27 00.

By Logan's bill, see pg 11, he admits payment of five dollars thirty-five cts and claims balance due \$55 00.

For errors assigned, see pl'ff error's abstract.

Def'ts in error filed two pleas: as follows:

1st. That pl'ff in error, McClerkin, on 17th Dec 1857, made his written release, thereby waiving and releasing all errors in the cause in the court below.

2d. That on 23d of Jan 1858, after the suing out of a writ of error in this cause, pl'ff in error, McClerkin, by his instruments of writing under his seal, did release remit said def'ts in error all errors which had been made or committed by the Circuit Court.

12

Wm. O. Orestes

W. Orestes

by

Sagebrush

John Nov. 21. 1859

Mr. Johnston