

No. 14627

Supreme Court of Illinois

Mills

vs.

Henry

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

Wiley & Harkness
No. 24
(B. 1000)

J. W. Middleton & Co., Stationers, 196 Lake St.

Mills

Hargis

Ready

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14627

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UNITED STATES OF AMERICA,
STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, 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 third day of June in the year of our Lord One Thousand Eight Hundred and Sixty one and of the Independence of the United States of America the Eighty fifth.

Present, The Honorable John M. Wilson Chief Justice of the }
Superior Court of Chicago. }

Wm. H. Higgins }
Grant Goodrich } Judges.

Charles Haven Prosecuting Attorney.

Anthony B. Hesing Sheriff of Cook County.

Attest, Charles Kimball Clerk.

Be it remembered that heretofore to wit on the twenty second day of March in the year of our Lord one thousand eight hundred and sixty one came Bernard Heeney and Archibald Campbell by A. A. Mulligan their Solicitor and filed in the Office of the Clerk of said Superior Court their certain Petition for a Mechanics Lien: Which said Petition is in words and figures as follows, to wit:

"To the Honorable the Judges of the Superior Court of the City of Chicago,
Your Petitioners Bernard Heeney and Archibald Campbell respectfully show
That John R. Mills of the City of Chicago is

the County of Cook and State of Illinois on the
 twenty seventh day of September A.D. 1858, being
 peized of or otherwise well entitled to the South half
 of Lot four (4) in Block fourteen (14) in the
 Assessors Subdivision of the South West Quarter
 of Section Twenty two (22) Township Thirty nine
 (39) North of range fourteen (14) East situated
 in said County, and desirous of erecting and
 building a house on said lot made and entered
 into, with your Petitioners, a Contract in writing,
 wherein and whereby your Petitioners agreed, to
 build, finish and complete in a careful, skillful
 and workmanlike manner, to the satisfaction of
 William H. Borington, or his assistant Super-
 intendent, within three years, but not at the
 times in the specifications and in said Contract
 mentioned to wit, on or before the 15th day of
 June A.D. 1859, the Carpenters and Joiners
 work of a dwellinghouse, to be erected on said
 Lot, and in consideration thereof the said John
 B. Miles agreed to pay your Petitioners Four
 hundred and twenty five dollars in Cash when
 the building should be ready for finishing, and
 the balance Twenty seven hundred and ninety
 dollars, by a Warranty deed, to be made when
 the Contract-^{ed} said building should be
 completed, for a lot of land contiguous to said
 Lot upon which said building was to be built

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and particularly described in said Contract.

Your Petitioners further state that it was agreed between the parties in and by said Contract—that said John R. Mills, by conferring with said Boyington the Architect thereof might modify alter or change the plans of said building, and in case of an additional amount of work, by reason of such modification changes or alterations that your Petitioners should be paid therefor in the ratio such additional work should bear to the work agreed to be done under the Contract, to be determined by the Architect, And it was further provided and stipulated in said Contract that the owner, to wit, said John R. Mills, should be bound in all cases to recognize the act of his Superintendent - to wit - the said Boyington, not only as regards the work, but also as to the sufficiency of the design, materials and workmanship.

And your Petitioners further state that in pursuance of said Contract, they proceeded to build said house, as agreed, and completed the same as provided for, that said Mills paid them the said sum of four hundred and fifteen dollars And also conveyed to them a lot of land, by subsequent agreement other than the lot agreed to be conveyed in and by said Contract, which said lot so conveyed was worth $\frac{20}{100}$ Nineteen $\frac{20}{100}$ dollars less than the lot agreed to be conveyed.

And they further show that in consequence of modifications, changes and alterations in said building made by said Mills, under the advice of said Architect, they did and performed extra work and labor on said building, which said work and extra labor amount to the sum

Five hundred and thirty five dollars and twenty Cents. And that the amount now due them under and by virtue of said Contract is Five hundred and fifty four dollars and forty five Cents, which has been certified to by said Boyington to be correct.

Therefore they pray your Honors to decree that said sum be paid to them, and that the same be a lien on said Lot upon which said house was so built by your Petitioners, and that the interest of said Mills therein be sold for the payment thereof and for other proper relief.

James. A. Mulligan
Solv. p. q.

And thereupon on the said twenty second day of March A.D. eighteen hundred and sixty, Summons issued out of and under the Seal of said Court against John. R. Mills the defendant therein, which said Summons with the Sheriffs return thereon indorsed is in words and figures as follows, to wit.

"State of Illinois
County of Cook } &c

The People of the State of Illinois
To the Sheriff of said County, Greeting
We command you that you summon John. R. Mills, if he shall be found in your County, personally to be and appear before the Superior Court of Chicago of said Cook County, on the first day of the next term thereof, to be holden

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at the Court House, in the City of Chicago in
said Cook County, on the first Monday of April
next, to answer unto Bernard Heeney & Archibald
Campbell, in his certain Petition for Mechanics
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.

Seal.

Witness Walter Kimball, Clerk of our
said Court, and the Seal thereof, at
the City of Chicago in said County
this 22nd day of March A.D. 1860.
Walter Kimball. Clerk

(Sheriff's return)

Served this Writ on the within
named John R. Mills, by delivering a Copy thereof
to him the 23rd day of March A.D. 1860.

John Gray, Sheriff
By A. Steinhaus - Deputy.

And thereafter to wit on the nineteenth day
of April A.D. eighteen hundred and sixty came
the said defendants by Van Buren & Gary their
Solicitors and filed in the office of the Clerk of
said Court, in said cause, their Demurred to
said Petition: Which Demurrer is in words and
figures as follows, to wit,

John R. Mills

vs

Bernard Heeney &
Archibald Campbell

In the Superior Court of
Chicago,
April Term A.D. 1860.

And the said defendants by Van
Buren & Gary his attorneys comes and says that

the said Petition of the said Plaintiffs & the matters and things contained therein are not sufficient in law to entitle the said Plaintiffs to have or maintain their said action against him the said defendant. Therefore for want of a sufficient petition the said defendant prays judgment for
 "New Burns & Gary
 Defts Attys."

(Counsel in Response)

Bernard Keeney et al

vs

John R. Miles

In the Superior Court of
 Chicago. April 5. 1860.

Now come said Plaintiffs and say that said Petition and the matters and things therein contained are sufficient for the said Plaintiffs to have and maintain their aforesaid action.

Therefore they pray judgment for
 "James A. Mulligan."

And afterwards to wit on the third day of April (said day being one of the days of the April term of said Court) A. D. eighteen hundred and sixty one, the following proceedings were had in said Cause, and entered of record in said Court, to wit:

Bernard Keeney
 and Archibald Campbell

vs

John R. Miles

Meeks Lien

This day comes the said Petitioners by Jas. A. Mulligan their attorney and

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the said Defendant by Van Buren & Gary his attorney also comes and this cause coming on to be heard upon the Demurrer hereto pleaded in bar to the petition filed in this cause was argued by counsel and the Court being fully advised in the premises is of the opinion that the petition and the matters therein contained are sufficient to maintain this action, the Demurrer to said Petition is therefore overruled by the Court.

And afterwards to wit on the fifth day of April (being as yet of the said April term of said Court) A. D. eighteen hundred and sixty one, the following further proceedings were had in said cause and entered of record in said Court, to wit:

" Bernard Steeny	}	Weeks Clerk
the Cheibald Campbell		
vs		
John B. Mills	}	

And now again comes the said Petitioners by James W. Mulligan their attorney and on his Motion It is ordered that the said Defendant who has entered his appearance herein, file his answer to the Petition in said cause by the twenty third day of April Instant.

And afterwards to wit on the tenth day of April (being still one of the days of the said April term of said Court) A. D. eighteen hundred and sixty one, the following further proceedings were had in said cause, and entered of record in said Court, to wit:

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" Bernard Steeny
 and Archibald Campbell
 vs
John R. Miles . . . Mechanics Lien

And now again comes the said defendant by his Attorneys Van Buren & Gary and the said Petitioners by James. Co. Mulligan their Attorney also come and the Court having overruled the Demurrer put in by the said defendant to the Petition filed in said case, the said defendant now elects to abide by his said demurrer.

And afterwards to wit, on the Twenty seventh day of June (said day being one of the days of the June term of said Court) A.D. Eighteen hundred and sixty one, the following further proceedings were had in said case and entered of record in said Court, to wit,

" Bernard Steeny
 and Archibald Campbell
 vs
John R. Miles . . . Petition for Mechanics Lien
 Decree.

This day comes the parties by their Solicitors the said Petitioners by E. H. Brackett and the said defendant by E. Van Buren his Solicitor and the defendant failing to answer, but electing to stand to and abide by his demurrer to the Petition. On motion of E. H. Brackett complainants' Solicitor default is entered herein against said defendant for want of answer thereupon defendant appears by E. Van Buren his Solicitor

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and by consent of Complainants and defendant's Solicitors the assessment of damages herein is submitted to the Court without the intervention of a Jury, and the Court after hearing all of the evidence (oral and documentary) find and order adjudged and decree that said Complainants performed their said contract as alleged, and that there is justly due and owing to them by said defendant for and on account of such performance in the construction and erection of said building specified in said petition the sum of Six hundred and forty dollars and ten cents. That for the payment of said sum and interest thereon said Complainants have and hold a lien on all and singular the right, title, interest and estate the said defendant John B. Mills now has in said building and the land whereon the same is situated, and also a lien on all and singular the right title interest and estate that the said John B. Mills has therein on the 29th day of September 1858 the date of the Contract for erecting and building, and also a valid lien for said sum on said dates respectively, on all and singular the interest and estate of said Mills in the tract or parcel of land whereon said building is and was situated, to wit, The South half of Lot four (4) in Block fourteen (14) in the Assessors Subdivision of the South west Quarter of Section Twenty two (22) Township Thirty nine (39) North of range fourteen (14) East, situate in the City of Chicago, County of Cook and State of Illinois -

That in default of the payment of said sum of \$640.10. Six hundred and forty dollars & ten cents and interest within Ten days from the date hereof, process issue

40
therein by the clerk of this Court, to Chas Scott, a
Master in Chancery of this Court, commanding
and directing the said Master to sell all and
singular the right title and interest of the said
John R. Mills in and to said building and
lands, and also all the right title and interest
the said John R. Mills has therein on the said
29th day of September 1858, the date of the contract
for said building specified in said Petition

And it is further considered ordered and decreed
by the Court, that in default of the interest of the
said John R. Mills paying for a sum sufficient
to satisfy this decree, interest and costs that further
process issue therefor in personam on this decree
for the balance owing this decree, and the
proceedings thereon had.

And afterwards to wit on the twenty eighth
day of June (being still one of the days of the
said June term of said Court) at 8 eighteen
hundred and sixty one, the following further
proceedings were had in said cause and entered
of record in said Court, to wit,

" Bernard Healey and
Frederick Campbell } Petition for Mechanics Lien
vs } Decree
John R. Mills ..

Appeal prayed & allowed
This day comes the said
defendant by E. Van Buren his attorney and
prays and appeals herein to the Supreme Court of
this State from the judgment of this Court, which
is allowed to him in filing Appeal bond in the

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penalty of One thousand dollars with security
to be approved by a Judge of this Court, and to
be filed within ten days from the date hereof.

And thereafter to wit on the Sixth day of
July A. D. Eighteen hundred and Sixty one
came the said defendant by his said attorney and
filed in the office of the Clerk of said Court his
Appeal Bond in said cause which said Bond is
in words and figures as follows, to wit,

* Know all Men by these presents that we
John R. Miles and Henry W. King of the City of
Chicago, County of Cook and State of Illinois are
held and firmly bound unto Bernard Heeney &
Archibald Campbell in the sum of One thousand
dollars to be paid to the said Bernard Heeney
and Archibald Campbell their executors adminis-
trators or assigns, to which payment well and
truly to be made we bind ourselves our heirs
executors & administrators, jointly and severally
firmly by these presents. Sealed with our seals
and dated this Sixth day of July A. D. 1861.

Whereas John R. Miles has appeared to the
Supreme Court of the State of Illinois from a
doce of the Superior Court of Chicago to enforce
a Mechanics Lien made and entered in a cause
in which the said Bernard Heeney and Archibald
Campbell are complainants and the said John R.
Miles is defendant, on the 27th day of June 1861
for the sum of Six hundred and forty dollars &
ten cents and costs.

Now therefore the condition of this obligation is such
that if the said John R. Miles shall duly prosecute

12 said Appeal and shall pay all costs, judgments
interest and damages, which shall be awarded
against him in case the said decree shall be
affirmed, then this obligation to be void, otherwise
to remain in full force.

Approved July 6th 1861.
Wm. H. Higgins
Judge.

John B. Miles (Seal)
H. W. King (Seal)

State of Illinois
County of Cook

I Thomas B. Carter Clerk
of the Superior Court of Chicago, in the County
of Cook and State of Illinois do hereby certify
the above and foregoing to be a full true and
correct transcript of the Petition for Mechanics
lien - process - Demurrer & Appeal Banco, now on
file in my office, together with all orders and
decrees entered of record in said Court, in a
certain suit therein, wherein Bernard Stearns and
Archibald Campbell were plaintiffs and John
B. Miles, defendant.

In testimony whereof I have
hereunto set my hand and affixed
the Seal of said Court at Chicago
in said County, this twenty
eighth day of April A.D. 1867.
Thomas B. Carter Clerk



State of Illinois vs. April term of said
Supreme Court of Court A.D. 1863.

John R. Mills	}	Plaintiff in Error.
vs		Error to Superior Court
Bernard Steeny	}	of Chicago.
Archibald Campbell		Defendants in Error

Assignment of Errors.

And now comes the said John R. Mills by Knott and his attorneys and says that in the record and proceedings aforesaid and in the rendition of the judgment and decree aforesaid there is manifest error in this, to wit:

- 1 The Petition for a mechanics lien is insufficient.
- ~~2~~ ~~The demurrer to the Petition~~
- 2 The court erred in overruling the demurrer to the Petition.
- 3 The court should have sustained the demurrer to the Petition.

4

The court erred in rendering
the decree aforesaid in manner
and form aforesaid.

Thos H Reed
Atty for Plff. in error

James Cant
Bernard Heene &
Archibald Campbell
adly

John C Mills

and now come the
suit ~~redundant~~ by Dr orwell
& Smith their atty and that
there is no error in the record
aforesaid Formed & Smith
sept atty

Filed Apr. 22. 1863.
L. H. H. H.
C. H.

332 29
Superior Court of Chicago

24

Bernard Henry et al

vs

John R. Mills

Transcript

Filed Apr. 30. 1862
S. Veland
Clk.

\$14.00

State of Illinois vs. April term 1862
Supreme Court of said Court.

John R. Mills }
vs } Error to Superior
Bernard Heene } Court of Chicago,
Archibald Campbell }

Charles H. Reed being
duly sworn on his oath says
that he is well acquainted
with Solomon A. Smith
who signed the appeal bond
in said cause: and that
he, defendant, saw said Smith
sign said bond: and that
he, defendant, knows that
said Smith is the owner
of a large amount of
~~real estate~~ unencumbered
real estate situated in
the City of Chicago in
the County of Cook and
State of Illinois, which
is well worth five thou-
sand dollars in cash:
defendant further says that
he is informed and verily
believes that said Smith is

not indebted to any person:
 and that said Smith is
 the owner of a large amount
 of personal property in
 the said city of Chicago, worth
 at least five thousand
 dollars: and that said Smith
 is reputed to be worth at
 least fifty thousand dollars.

Subscribed & sworn to before
 me this 30th day of April 1862
 L. Leland Clerk
 by J. B. Rice Deputy

Charles H. May

332

24 62

John R. Mills

107

Edward Henry

etal

Off. of Reed

Filed April 30. 1862
 L. Leland Clerk

State of Illinois } 1st April term A.D. 1863
Supreme Court } at Ottawa.

John R. Mills } Plff. in Error
vs } Error to Superior
Bernard Henry } Court of Chicago.
Archibald Campbell } Defs in error

Abstract of Record

This was a proceeding to enforce a mechanics lien brought by Defendants in error against Plaintiff in error in the Superior Court of Chicago.

Page of Record

1 Petition was filed March 22^d 1861.

2 Petition shows that on the 27 day of September A.D. 1858 a contract in writing was made whereby Defendants in error agreed to do the carpenter and joiner work upon the dwelling house mentioned in a careful skillful and workmanlike manner ~~by and~~ at the time within three

2 years, to wit on or before the 15th day of June A.D. 1888, and that the Plff in error agreed to pay them therefor \$425; in cash when the building ~~was~~ should be ready for lathing - and the balance \$2750. by a warrant deed, to be made when the contract for said building should be completed, of a lot of land contiguous to the lot on which said house was to be erected.

3 The Petition further shows that it was agreed in and by said contract that said Mills (Plff in error) should have the right to change alter or modify the plan for said house by conferring with the architect Boyington and that Defendants in error were to be paid for what extra work and labor they performed in consequence of any change or modification

of said contract in the ratio such extra work and labor should bear ^{to} the work to be done under the contract as originally made.

Petition shows that in consequence of changes and modifications in said contract Defendants in error performed extra work and labor upon said house to the amount of \$535.⁽²⁰⁾/₁₀₀; for which they pray for a lien on said house.

4 Petitioners pray for a lien for the sum of \$534.⁽⁴⁵⁾/₁₀₀.

4 & 5 Summons and return thereon.

5 & 6 General demurrers to the Petition.

7 Order of the court overruling the demurrers to the Petition.

8 Plff. in error elects to stand by his demurrers.

8x9

cause submitted to the court,
jury being waived, to find
the amount due:

9

Court found the amount
due to be \$640.⁽¹⁰⁾/₍₁₀₀₎:

Court decreed the same a
lien on the house from the
28th day of September 1888.

10

Court decreed that the Plff.
in error should pay said
sum of \$640.¹⁰/₁₀₀ in ten days
from the date of said decree,
(which was entered June 28th 1888)
and in default thereof that
the premises be sold by the
master in chancery to pay
and satisfy the same

10

11

Appeal prayed and allowed.

11x12

Appeal bond approved by
the court.

12

Certificate of the clerk to the
record.

Brief of Plff. in error

This was a proceeding to enforce
a mechanics lien.

The Petition shows that on the
~~28th~~ 27th day of September A.D.
1858 a contract in writing
was made, whereby the Defendants
in error agreed to do the
carpenter and joiner work
upon the dwelling house
mentioned in the Petition
within three years by and at
the time mentioned in said
contract, to wit on or before
the 15th day of June A.D. 1861.
See page 2 of the record.

We submit that this averment is insuffi-
cient, for the reason that the time
within which the contract was to be
performed is not alleged
with sufficient certainty.

21 Vols. 425-431-437.

22 " 252,

24 " 198.

Page 2 of Record.

The Petition shows that the payment of a part of the price for performing the work was to be made when the house ~~was~~ should be ready for lathing. It does not state when the house was to be ready for lathing.

We submit that this is insufficient for the reason that it is impossible to determine from such averment when the payment of ~~the~~ the said \$425. was to be made.

The time of payment must be fixed and certain. See cases above cited.

The Petition provides that the plan of the house might be changed or modified by the Plff. in error by conferring with ~~Boysington~~ Boysington the architect; and that the Plff. in error should pay for the extra work done in consequence of such change or modifications in the ratio such additional work should bear to

Page 3 of Record.

Page 3 of Record. the work agreed to be done under the contract, to be determined by the architect.

Page 3 of Record. The Petition shows that the Drft's in error performed extra work and labor to the amount of \$535²⁰/₁₀₀ which said Borgington has certified to be correct.

Page 4 The Petition claims that the said sum of \$535²⁰/₁₀₀ is due under and by virtue of said contract, and prays for a lien for that sum.

We submit that the Petition is clearly insufficient as to the said claim of \$535²⁰/₁₀₀, for the reason that the Petition fails to show when the said extra work was performed or to be performed; and entirely fails to show when the payment therefor was to be made.

In this we think the Petition is clearly defective and insufficient.

242lls 110 — 198 cases there cited.

21 .. 435: 437.

from the Petition

As it is uncertain, when the last payment was to be made, it is impossible to determine whether this suit was commenced within six months after the last payment was due and payable.

If the mechanic or material man may commence his suit to ~~enforce the lien~~ against the debtor to enforce the lien after six months from the time the last payment becomes due, he should allege in his Petition that there are no creditors or incumbrancers who would be injured by the proceedings. This should be required that the court may know from the record that the mechanic or material man is entitled to the lien sought by him: for the reason that the mechanic, or material man, has no right to his lien as against creditors or incumbrancers after the expiration of six months from the time the last payment becomes due.

If any time at all is ~~fixed~~
stated in the Petition when
the last payment was due
(which we in no wise admit)
such time was the 15th day of
June A.D. 1859: - - - - -

The Petition was not filed until
the 22^d day of March A.D. 1860,
which ~~was~~ makes more than
nine months after the last
payment became due.

~~There~~ There is no overruling whatever
in this Petition as to whether
there were any creditors or
incumbrances ~~up~~ to be affected
by the proceedings, and the
Plaintiff in error, John R. Mills,
is the sole Defendant.

We submit that the decree
in this case is erroneous for
the reason that the suit was
not commenced within six
months from the time the
last payment was due.

Cook et al vs Held et al 21 Ill.
425: 430.

Cook et al vs Treeland &c. 436.
Brown et al vs Moore 26 Ill. 421.

We submit that the decree is erroneous for the reason that it provides for a sale of the premises if the amount found due is not paid in ten days.

It should have given the Pff. in error ninety days in which to make payment.

24 Ill. 558. Claycomb vs Cecil
27 do. 457. Strawn et al vs Keywell
et al 28 do 457.

The prayer for a lien is ^{only} for the sum of \$554.⁴⁵.

The decree is for \$640.50.

We submit that the decree should not be for a greater ~~sum~~ amount than is claimed in the Petition.

Brace 174. 3 Scam. 347. 2^d Gil. 375

~~Robert A. Ward~~
~~Attorney for Pff. in~~
~~Case~~

~~4 Gil. 77.~~ 19 Ill. 46. 22 Ill.
287. 24 Ill. 197.

In the case last cited the Court say:

"There is no rule of practice better settled than that it is error

- = to render judgment for a ~~larger~~
- & larger sum than that claimed
- = & in the declaration, whatever
- = the form of the action.

Thos A Reed
Atty's for Plff. in error.

John R. Mills

vs

Bernard Healey
et al

Abstract of Record
and Appellants brief

Filed April 30. 1862
L. Deland
Clerk.

332 24-29

SUPREME COURT OF ILLINOIS

APRIL TERM, 1864.

JOHN R. MILLS,
vs.
BERNARD HEENEY, *et al.* } DEFENDANTS' POINTS.

I.

The statement in the petition is sufficient to bring the case within the statute. The entire work was to be completed on or before the 15th June, A. D. 1859. This evidently included the extra work. Payment was to be made as follows, viz: \$425 when the building should be ready for lathing, and the balance when the building should be completed.

II.

It is not for the defendant to complain that the suit was not brought within six months from the time the debt was due.

R. S. Chap. 55, Sec. 24.

There is no presumption or evidence that there was any other creditor or incumbrancer. If there were any, not having been made parties, they would not be affected by the decree.

III.

As to the objection that the decree is for more than was claimed in the petition, no such question was made in the court below. The parties were both present at the time, and no objection was made that the finding was for more than was claimed. Nor is this assigned for error on the record in this court. The assignment of errors contained in the printed abstract of the plaintiff is not the same as the one on the record.

FARWELL & SMITH

Solicitors for Defendants.

24 29

Supreme Court
Apr Term 1864

John R. Mills

vs

Bernard H. Conner
et al

Deft. Points.

Filed May 26, 1864
J. Leland McK

Hamrell & Smith
Sols for Defts

Know All men by these presents
that we John R. Mills and Solomon
A. Smith are held and firmly
bound unto Bernard Heenev and
Archibald Campbell in the
penal sum of one thousand
dollars lawful money for the
payment of which well and
truly to be made we hereby bind
ourselves our heirs executors
and administrators firmly by
these presents.

Witness our hands and seals this
28th day of April A.D. 1862:

The condition of this
obligation is such that whereas
the said Bernard Heenev and
Archibald Campbell on the
27th day of June A.D. 1861
recovered a judgment in
the Superior Court of Chicago
against the said John R. Mills
for the sum of six hundred
and forty dollars and ten
cents and costs of suit, from
which judgment the said
John R. Mills has taken
an appeal to the Supreme
Court by writ of error:

Now if the said John R. Mills
shall well and truly pay said
judgment, costs, interest and
damages in case said judgment
shall be affirmed and shall
duly prosecute said appeal,
then this obligation is to be
void otherwise to remain in
full force and effect.

John R. Mills Secy
John R. Mills Secy

State of Illinois } ss.
County of Cook }

Solomon A. Smith
being duly sworn on his oath
says that he signed the appeal
bond hereto attached: and that he
is worth over and above all of
his debts five thousand
dollars: and that he is the
owner of five thousand dollars
worth of ~~real estate~~ unencum-
bered real estate situated in
the City of Chicago in said
County: and that he is the
vice president of the Merchants
Savings Loan and Trust Co.

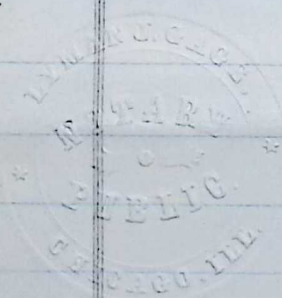
Solomon A. Smith

Subscribed & sworn to before

me this the twenty ninth day of April A.D. 1862

Lymon J. Gage

Notary Public



62 882

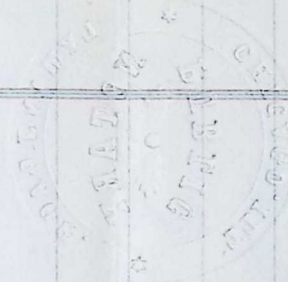
24 29

John R. Mills
14

Bernard Henry
et al.

~~Affidavit~~
Supersedeas Bond

Filed May 1, 1862
L. Ireland
Ck.



STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,

To the Clerk of the Superior Court ~~for the County~~ Chicago - Greeting:

Because, In the record and proceedings, as also in the rendition of the judgments of a plea which was in the Superior Court of Chicago County, before the Judge thereof, between

Bernard Henry & Archibald Campbell

plaintiffs and

John R. Mills

defendant....., it is said manifest error hath intervened, to the injury of the aforesaid.

John R. Mills

as we are informed by his

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

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 1st day of May in the Year of Our Lord One Thousand Eight Hundred and Sixty two.

L. Seland

Clerk of the Supreme Court.

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John R. Mills

No. 332

vs.

Arvey & Campbell

WRIT OF ERROR.

This Writ of Error is made a
Supersedeas, and as such is to be
obeyed by all concerned.

L. Veland

Clerk.

FILED

May 1.

A. D. 1862

L. Veland

Clerk.



ASSIGNMENT OF ERRORS.

And now comes the said John R. Mills, by Knox & Reed, his attorneys, and says that there is manifest error in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, in this, to wit :

1. The court erred in overruling the demurrer to the petition.
2. The court erred in rendering the decree aforesaid, in manner and form as aforesaid.
3. The petition is insufficient to give the court jurisdiction.
4. The court erred in rendering a decree for a greater amount than was claimed in the petition.

POINTS FOR PLAINTIFF IN ERROR.

This was a proceeding to enforce a mechanics' lien.

The petition shows, that on the 27th day of September, A. D. 1858, a contract in writing was made, whereby the defendants in error agreed to do the carpenter and joiner work upon the dwelling house " mentioned in the petition, within three years, by and at the time mentioned in said contract, to wit., on or before the 15th day of June, A. " D. 1859." (See page 2 of the record.)

We submit, that this account is insufficient, for the reason that the time within which the contract was to be performed is not alleged with sufficient certainty.

21 Ill., 425—431—437.

22 Ill., 252.

24 Ill., 197.

2 The petition shows, that the payment of a part of the price for performance of the work was to be made "when the house should be ready for lathing." It does not state *when* the house was to be ready for lathing.

We submit, that this is insufficient, for the reason that it is impossible to determine from such averment *when* the payment of the said \$425 was to be made.

The time of payment must be fixed and certain (see cases cited above).

3 The petition provides that the plan of the house might be changed or modified by the plaintiff in error by conferring with Boyington, the architect; and that the plaintiff in error should "pay for the extra work done in consequence of such change or modifications, in the ratio such additional work should bear to the work agreed to be done under the contract, to be determined by the architect."

3-4 The petition shows, that the defendants in error performed *extra work* and *labor* to the amount of \$535.20, which said Boyington has certified to be correct.

4 The petition claims, that the said sum of \$535.20 is due under and by virtue of said contract, and prays for a lien for that sum.

We submit, that the petition is *clearly insufficient* as to the said claim of \$535.20, for the reason that the petition fails to show when the said extra work was performed or to be performed; and *entirely* fails to show when the payment therefor was to be made. In this, we think the petition is defective and insufficient.

24 Ill., 110—197, and cases there cited.

21 Ill., 435—437.

As it is uncertain, from the petition, when the last payment was to be made, it is impossible to determine whether this suit was commenced within six months after the last payment was due and payable.

If the mechanic or material man may commence his suit against the debtor to enforce the lien, after six months from the time the last payment becomes due, he should allege in his petition that there are no creditors or incumbrancers who would be injured by the proceedings. This should be required, that the court may know from the record that the mechanic or material man is entitled to the lien sought by him ; for the reason that the mechanic or material man, has no right to his lien as against creditors or incumbrancers, after the expiration of six months from the time the last payment becomes due.

If any time at all is stated in the petition when the last payment was due (which we in no wise admit), such time was the 15th day of June, A. D. 1859.

The petition was not filed until the 22d day of March, A. D. 1860, which makes more than nine months after the last payment became due.

There is no averment whatever in this petition as to whether there were any creditors or incumbrancers to be effected by the proceedings, and the plaintiff in error, John R. Mills, is the sole defendant.

We submit, that the decree in this case is erroneous, for the reason that the suit was not commenced within six months from the time the last payment was due.

Cook et al. v. Vreeland, 21 Ill., 425-430.

Brown et al. v. Moore, 26 Ill., 421.

We submit, that the decree is erroneous, for the reason that it provides for a sale of the premises if the amount found due is not paid in TEN DAYS. It should have given the plaintiff in error ninety days in which to make payment.

24 Ill., 551.

Claycomb v. Cecil, 27 Ill., 497.

Strawn et al. v. Cogswell et al., 28 Ill., 457.

(6)

The prayer for a lien is ONLY for the sum of \$554.45 ; *whereas, the decree is for \$640.10.*

We submit, that the decree should not be for a greater amount than is claimed in the petition.

Breese, 174.
3 Scam., 347.
2 Gil., 375.
19 Ill., 46.
22 Ill., 287.
24 Ill., 197.

In the case last cited, the court say :

“ There is no rule of practice better settled than that it is error to
“ render judgment for a larger sum than that claimed in the declaration,
“ whatever the form of the action.”

KNOX & REED,
Attorneys for Plaintiff in Error.

24 29

John R. Mills

vs.

Bernard Horney et al.
Abstract of Record and
Brief and Points for
Plaintiff in Error

Filed April 19 1864
L. L. Leland cler