

14729

No. _____

Supreme Court of Illinois

Mixter, Imp.

vs.

Harper et al

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
THIRD GRAND DIVISION.

No. 43

J. W. Middleton & Co., Stationers, 496 Lake St.

Miffher
75

Harp

1865

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

GEORGE MIXTER, IMPEADED, &c.,
Plaintiff in Error,

v.

STEPHEN AINSWORTH,
Defendant in Error.

Error to Rock Island.

ABSTRACT OF RECORD.

R. p. 1 PETITION FOR mechanic's lien.

2 The petition alleges that on or about the first day of January, 1857,
3 in block 19, in the original town of Rock Island, in the county of Rock
Island, and State of Illinois. That said Cossum was then and there about
erecting a two-story brick dwelling house on said lot. That on the said
first day of January, 1857, the said Cossum made and entered into a
contract with the defendant in error to furnish the necessary materials
for and perform certain work in and about said house in the painting and
glazing thereof.

The following is a literal copy from said petition, to wit:

The said work "to be performed by your petitioner at the reasonable
request of said Cossum during the year 1857, and for which the said

“Cossum agreed to pay your petitioner the reasonable worth and value,
“on request. That in accordance with said contract, your petitioner
“furnished materials for, and performed work and labor in painting
“and glazing in and about said dwelling house for said Cossum accord-
“ing to the bill thereof hereto annexed and marked ‘A’ and reasonable
“worth and value thereof is set down and charged in said bill. That in
“consideration thereof the said Cossum afterwards, to wit, upon the com-
“pletion of said work by your petitioner, to wit, on the 21st day of
“August, 1857, at the county of Rock Island aforesaid, promised your
“petitioner to pay him the reasonable worth and value of the said ma-
“terials, amounting to the sum of \$71.10 whenever he, the said Cossum
“should be thereto afterwards requested.”

3 The petition further alleges, that said Cossum, although often requested, has not paid the said sum, nor any part thereof; that said Cossum and wife on the 28th day of August, 1857, conveyed said premises to George Mixer, the plaintiff in error, and executed him a deed thereof.

3-4 PRAYER for a mechanic's lien on said premises to pay the above sum of \$71.10.

4 "ACCOUNT 'A.'"

"1857. MR. JOHN COSSUM,

"To Stephen Ainsworth, Dr. :

“ To painting on house and furnishing materials therefor :

"	plain painting.....	\$30 00
"	graining	10 00
"	painting roof.....	17 50
"	glazing 76 lights at 10 cts.....	7 60
"	" common, 60 lights at 10 cts.....	6 00

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5 SUMMONS and return of service thereof by the sheriff of Rock Island
county.

6 DEMURRER of George Mixter, plaintiff in error, to the petition.

- 7 ORDER of the court overruling the demurrer to the petition, and requiring the plaintiff in error to answer the petition.

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- 8 The answer denies that said Cossum was the owner of the said premises as alleged in said petition, and that there is any such amount due the defendant in error from said Cossum, which can lawfully be made a lien on said premises.

Said answer admits that said Cossum executed to George Mixter, the plaintiff in error, a deed for said premises on August 28th, 1857, as alleged in said petition.

- 9 AFFIDAVIT of truth of answer.

EXCEPTIONS by defendant in error to answer of plaintiff in error, because it is "irrelevant, irresponsible, immaterial and evasive."

- 10-11 REPLICATION TO ANSWER.

- 12 EXCEPTIONS one and two to answer sustained, and leave to file an amended answer.

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"The final decree in this case is the same as in the case of *Harper & Steele v. John Cossum and George Mixter*, and there is but one record of such final decree."

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43

George Miller
vs.
Stephen Sineworth
Abstract of Record

Filed Apl. 19, 1864,
L.eland
Ct.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

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v.		
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CERTIFICATE OF CLERK OF COURT BELOW TO THE RECORD.

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George Mixer
vs.
Stephen Ainsworth
Abstract of Record

Filed Apr. 19. 1864.
Skeland
Ch.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

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vs.
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Abstract of Record

Filed Apr. 19. 1864
Leland
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APRIL TERM, A. D. 1864. }

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George Thaxter
vs.

Stephen Sinsworth
Abstract of Record

Filed Apr. 19. 1864
L. Keland
Clerk.

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THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

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George Miller

vs.

Stephen Senenworth

Abstract of Record

Filed Apr. 19, 1864
L. Kelam
Clk.

STATE OF ILLINOIS,
SUPREME COURT.

} ss. The People of the State of Illinois,

To the Sheriff of Rock Island County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit — Court of Rock Island County, before the Judge thereof, between

George Clister, Impleaded

~~plaintiff~~, and

Stephen Arisworth

~~defendant~~, it is said that manifest error hath intervened, to the injury of the said

George Clister

as we are informed by his — complaint the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Stephen Arisworth

that he — be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if he — shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Stephen Arisworth

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 28th day of March in the year of our Lord One Thousand Eight Hundred and Sixty-Three.



L. Seland
Clerk of the Supreme Court.

George Clifton
 No. vs. Stephen Arisworth

SCIRE FACIAS.

FILED April 20 A. D. 1864

L. Leland Clerk.

Shiffs fee \$ 0.65
Rec'd my fee in full
C. A. McLaughlin Sheriff
R. S. Cordell

C. A. McLaughlin Sheriff of
Rock Island County Ill

State of Illinois
Rock Island County
 I have executed this writ by reading the same to the within named Stephen Arisworth this 3rd day of March A. D. 1864.



SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

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13-14 AMENDED ANSWER of George Mixter, plaintiff in error, which is substantially like the original answer above referred to.

15 AFFIDAVIT of truth of amended answer.

The clerk of the court below inserts the following certificate in the record of this case, to wit :

"The final decree in this case is the same as in the case of *Harper & Steele v. John Cossum and George Mixter*, and there is but one record of such final decree."

By reference to the said final decree, in the case of *Harper & Steele v. John Cossum and George Mixter*, it appears that by an agreement entered of record between the several attorneys of the respective

(4)

parties, this case of the *Plaintiff in Error* v. *Defendant in Error*, was heard and determined with that case, and only one decree was entered in both cases.

The said case of Harper & Steele is before this court at this term by writ of error.

The final decree entered in said cause of *Harper & Steele* v. *John Cossum and the defendant in error*, finds the amount due from Cossum to defendant in error, (Stephen Ainsworth) to be \$71.10. Said final decree orders and directs a lien on said premises for said amount, and orders and directs a sale of said premises by the sheriff of Rock Island county, to pay the said amounts.

15

CERTIFICATE OF CLERK OF COURT BELOW TO THE RECORD.

Handwritten notes:
March 3.
March 12.
March 19.
March 26.
March 31.
April 7.
April 14.
April 21.
April 28.
May 5.
May 12.
May 19.
May 26.
June 2.
June 9.
June 16.
June 23.
June 30.
July 7.
July 14.
July 21.
July 28.
August 4.
August 11.
August 18.
August 25.
September 1.
September 8.
September 15.
September 22.
September 29.
October 6.
October 13.
October 20.
October 27.
November 3.
November 10.
November 17.
November 24.
December 1.
December 8.
December 15.
December 22.
December 29.

43

George Miller
vs.

Stephen Ainsworth

Abstract of Record

Filed April 19, 1864
L. Veland
Clerk

State of Illinois }
Third Grand Division } In the Supreme Court
April Term A.D. 1863

Stephen Ainsworth, Defendant in Error }
vs } Error to Rock
George Britten, Plaintiff in Error } to Court

And now Comes the said Defendant
in Error. By J. S. Hawley his Atty and
moves this Court to dismiss this writ,
and for Cause Shows, that no transcript
of the Record of proceedings of the Court
below was filed in this Cause, in this
Court before the third day of the pres-
ent term, nor were any error assigned
in said Cause before the said third
day nor have any errors as yet been
assigned as required by Rule seven
of the printed Rules of this Court

J. S. Hawley

Atty for deft

12-5-43

Stephen Pineworth
add

George Wither

Motion by Suff-to-Licenses

Filed May 4, 1863

J. Seland
M

State of Illinois 2^d S. April term A.D. 1863
Supreme Court of 1863 of the Third
Grand Division

George Mixer 2^d Plff. in error
vs
Stephen Ainsworth 2^d Deft. in error

Error to Rock Island.

Dear Sir

You will please issue
a scire facias to hear errors
to said Defendant to Sheriff
of Rock Island County.

Yours &c
Herbert Reed

L. Seland Esq. Atty for Plff in error
Clerk Supreme Ct
Ottawa Ills.

Geo. Mister

vs
Stephen Ainsworth

Prize

Filed March 28,
1863

S. Island, C.W.

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1864. }

GEORGE MIXTER, IMPEADED, &c.,
Plaintiff in Error,

v.

STEPHEN AINSWORTH,
Defendant in Error.

Error to Rock Island.

ABSTRACT OF RECORD.

R. p. 1 PETITION FOR mechanic's lien.

2 The petition alleges that on or about the first day of January, 1857,
3 John Cossum was the owner of the west one-half of the west half of lot one,
in block 19, in the original town of Rock Island, in the county of Rock
Island, and State of Illinois. That said Cossum was then and there about
erecting a two-story brick dwelling house on said lot. That on the said
first day of January, 1857, the said Cossum made and entered into a
contract with the defendant in error to furnish the necessary materials
for and perform certain work in and about said house in the painting and
glazing thereof.

The following is a literal copy from said petition, to wit:

The said work "to be performed by your petitioner at the reasonable
"request of said Cossum during the year 1857, and for which the said

“Cossum agreed to pay your petitioner the reasonable worth and value,
“on request. That in accordance with said contract, your petitioner
“furnished materials for, and performed work and labor in painting
“and glazing in and about said dwelling house for said Cossum accord-
“ing to the bill thereof hereto annexed and marked ‘A’ and reasonable
“worth and value thereof is set down and charged in said bill. That in
“consideration thereof the said Cossum afterwards, to wit, upon the com-
“pletion of said work by your petitioner, to wit, on the 21st day of
“August, 1857, at the county of Rock Island aforesaid, promised your
“petitioner to pay him the reasonable worth and value of the said ma-
“terials, amounting to the sum of \$71.10 whenever he, the said Cossum
“should be thereto afterwards requested.”

3 The petition further alleges, that said Cossum, although often requested, has not paid the said sum, nor any part thereof; that said Cossum and wife on the 28th day of August, 1857, conveyed said premises to George Mixter, the plaintiff in error, and executed him a deed thereof.

3-4 PRAYER for a mechanic's lien on said premises to pay the above sum of \$71.10.

4 "ACCOUNT 'A.'"

"1857. MR. JOHN COSSUM,

"To Stephen Ainsworth, Dr. :

“To painting on house and furnishing materials therefor:

" plain painting.....\$30 00

"graining10 00

" painting roof.....17 50

" glazing 76 lights at 10 cts. 7 60

“ “ common, 60 lights at 10 cts..... 6 00

\$71 10."

5 SUMMONS and return of service thereof by the sheriff of Rock Island county.

6 DEMURRER of George Mixter, plaintiff in error, to the petition.

- 7 ORDER of the court overruling the demurrer to the petition, and requiring the plaintiff in error to answer the petition.

THE ANSWER of George Mixter, plaintiff in error, to the petition.

- 8 The answer denies that said Cossum was the owner of the said premises as alleged in said petition, and that there is any such amount due the defendant in error from said Cossum, which can lawfully be made a lien on said premises.

Said answer admits that said Cossum executed to George Mixter, the plaintiff in error, a deed for said premises on August 28th, 1857, as alleged in said petition.

- 9 AFFIDAVIT of truth of answer.

EXCEPTIONS by defendant in error to answer of plaintiff in error, because it is "irrelevant, irresponsible, immaterial and evasive."

- 10-11 REPLICATION TO ANSWER.

- 12 EXCEPTIONS one and two to answer sustained, and leave to file an amended answer.

- 13-14 AMENDED ANSWER of George Mixter, plaintiff in error, which is substantially like the original answer above referred to.

- 15 AFFIDAVIT of truth of amended answer.

The clerk of the court below inserts the following certificate in the record of this case, to wit:

"The final decree in this case is the same as in the case of *Harper & Steele v. John Cossum and George Mixter*, and there is but one record of such final decree."

By reference to the said final decree, in the case of *Harper & Steele v. John Cossum and George Mixter*, it appears that by an agreement entered of record between the several attorneys of the respective

(4)

parties, this case of the *Plaintiff in Error* v. *Defendant in Error*, was heard and determined with that case, and only one decree was entered in both cases.

The said case of Harper & Steele is before this court at this term by writ of error.

The final decree entered in said cause of *Harper & Steele* v. *John Cossum and the defendant in error*, finds the amount due from Cossum to defendant in error, (Stephen Ainsworth) to be \$71.10. Said final decree orders and directs a lien on said premises for said amount, and orders and directs a sale of said premises by the sheriff of Rock Island county, to pay the said amounts.

15

CERTIFICATE OF CLERK OF COURT BELOW TO THE RECORD.

43
George Miller
vs.
Stephen Annisworth
Abstract of Record

Filed April 19. 1864
L. Island
CP.

PLEAS before the Honorable J. Wilson Drury,
Judge of the Sixth District of the State of
Illinois, at a term of the Circuit Court begun
and held at the Court House within and for
the county of Rock Island and State aforesaid,
on the first Monday, the seventh day of
December in the year of our Lord one thousand
eight hundred and fifty seven

Present, Honorable J. Wilson Drury Judge
Ezra M. Beardsley Sheriff
Quincy McNeil Clerk

Be it remembered that on the twenty fifth
day of November 1857 there was filed in the
office of the Clerk of the Circuit Court in the
City of Rock Island in the County and State
aforesaid a Petition for Lien in behalf of
Stephen Ainsworth and against John
Cossum and George Myster and which is
in the words and figures following to wit

State of Illinois }
Rock Island County } ss. Rock Island County Circuit
Court, To December Term
AD 1857.

To the Honorable J. Wilson Drury presiding
Judge of said court

The petition of Stephen Ainsworth of the City
of Rock Island in the County Rock Island and
State aforesaid respectfully represents unto
you honor. That on or about the first day of
January AD 1857, one John Cossum, who was
then the owner of a certain lot or parcel of
land situated in the county of Rock Island
and state aforesaid, known and described

as the west one half of the west half of lot number
 one (1) in Block number
 nineteen (19) in that part of the city of Rock
 Island known as the old or original town,
 was then and there about erecting and building
 thereon a two story dwelling house of brick.
 That the said John Cossum took at the time
 and place aforesaid made and entered into a
 contract with your petitioner to furnish the
 necessary materials for and perform certain
 work in and about said ^{the} dwelling house in the
 painting and glazing thereof, and to be per-
 formed by your petitioner at the reasonable re-
 quest of said Cossum and during the year
 1857 and for which the said Cossum agreed
 to pay your petitioner the reasonable worth
 and value, on request. That in accordance
 with said contract your petitioner furnished
 materials for and performed work and labor
 in painting and glazing in and about the
 said dwelling house for the said Cossum,
 according to the bill thereof herewith annexed
 marked "A" and reasonable worth and value
 thereof is set down and charged in said bill.

That in consideration thereof the said
 Cossum afterwards took upon the comple-
 tion of said work by your petitioner, took
 on the 21st day of August 1857 at the County
 of Rock Island aforesaid promised your peti-
 tioner to pay him the reasonable worth of the
 said materials amounting to the sum of
 seventy one dollars and ten cents, whenever he
 the said Cossum should be thereto afterwards
 requested. And your petitioner alleges that the

although often requested the said Cossum has not paid to your petitioner the aforesaid amount or any part of the same, but that the whole is yet unpaid and due to your petitioner.

Your petitioner further alleges that the said Cossum his wife on or about the 28th day of August 1837 made and executed a deed of conveyance to one George Myster of and for the lot and parcel of land aforesaid, as your petitioner is informed and believes.

And that the said George Myster as your petitioner is informed and believes now claims to own the said described premises, but your petitioner charges the fact to be that if any such deed of conveyance was made by the said Cossum wife to the said Myster, the same was made and executed subsequent to the contract of your petitioner with the said Cossum as aforesaid, and after the performance of work and labor by your petitioner upon the said dwelling house under and by virtue of said contract, and that the said deed, if any such there be, is subject to the prior claim of your petitioner to be a lien upon the said premises for the value and work and labor aforesaid and to the amount aforesaid. The premises considered your petitioner prays that the said John Cossum and George Myster be made parties defendants to this petition, and be required severally to answer the same, and that upon a hearing hereof that your Honor will be pleased to order a sale of the aforesaid premises and appurtenances and that

the proceeds thereof be applied to the payment and discharge of the aforesaid ~~former~~ demands of your petitioner, and that your petitioner may have such other and further relief, order &c as the statute in such case allows, and as your petitioner may be entitled to. And in duty bound your petitioner will ever pray, &c

Stephen Ainsworth, petitioner
by Wilkins & Pleasant his Sols

State of Illinois

Rock Island County

} ss

Stephen Ainsworth being duly sworn on oath deposes that he has heard read the foregoing petition and knows the contents thereof; that the matters therein stated on his own knowledge are true and the other matters therein stated he believes to be true.

Sworn & subscribed before me } S. Ainsworth
this 25th day of November 1857 }
Quincy McNeil Clerk

Mr John Cassin

To Stephen Ainsworth Dr

To painting on house and furnishing materials ~~for same~~

To plain painting 30.00

" graining 10.00

" painting Roof 17.50

" glazing 76 lights @ .10 7.60

" do common 60 lights @ .10 6.00

\$71.10

And afterwards to wit on the same day, the said 25th day of November 1857 there issued

forth of the office of the Circuit Clerk of
said County and State a writ of sum-
mons which is in the words and figures following to-wit:
State of Illinois }
Rock Island County } ss

The People of the State of Illinois
To the Sheriff of Rock Island County, Greeting.
We command you to summon John Cossum
and George Mixer if to be found in your County,
personally to be and appear before the Circuit
Court of said County on the first day of next
term thereof to be holden at the Court House in
Rock Island, on the first Monday of December
next, to answer to a bill of complaint filed in
our said Circuit Court against them (for
mechanics lien &c) by Stephen Ainsworth.
And have you then and there this writ, and
make return thereon in what manner you
execute the same.

Witness: Quincy McNeil. Clerk of the
said Court and the seal thereof affixed
this 25th day of November in the year
of Lord one thousand eight hun-
dred and fifty seven.

(Seal)

Quincy McNeil. Clerk.
And on the back of said writ is an endorse-
ment in the words and figures following to-wit:
I have served the within summons by
delivering a copy to the within named John
Cossum leaving a copy at the residence of
George Mixer with a white person over the age
of twelve years making them acquainted with
the contents of the same
Nov 26. 1857
E. M. Brambley Sheriff
R. I. Co. Ills

And be it further remembered that afterwards to wit on the 24th day of December 1857 there was filed in the office of said Circuit Clerk in the county and State aforesaid a demurrer which is in the words following.

Stephen Ainsworth

vs

John Cossum & George Mytton

And the said George Mytton one of the defendants in the above entitled cause comes and says that the above named plaintiff ought not to have and maintain his action aforesaid against him because he says the petition aforesaid and the matters and things therein contained are not sufficient in law to maintain the ^{action} aforesaid and that he is not bound by law to answer the same. Wherefore he prays judgment, that the said Plff may be bound of said action against him. Knox & Wilkinson

And afterwards to wit on the same day before the judge aforesaid at the December term 1857 of said Circuit and on the 16th day of said term being the 24th of December 1857 the following proceeding was had.

Stephen Ainsworth

vs

John Cossum & George Mytton

This day came the parties by their attorneys and defendant Mytton stated his motion for a continuance herein which is overruled by the Court. Thereupon said defendant filed his

his demurr to plaintiffs petition, which being heard is overruled by the Court. And on plaintiffs motion it is ordered that the defendants answer by the first day of February next.

And be it further remembered that on the 29th day of January 1858 the answer of George Myster was filed in the said office of Circuit Clerk of said County which is in the words and figures following.

State of Illinois

Rock Island County } ss

Rock Island Circuit Court
March Term 1858.

To the Honorable J. Wilson Drury, Judge
of the sixth Judicial Circuit in the State of
Illinois.

The answer of George Myster one of the defendants
to the petition of Stephen Sinsworth complainant.

This defendant now and at all times here-
after, saving to himself all and all manner
of benefit or advantage of exception or otherwise
that can or may be taken to the many errors,
uncertainties or imperfections in the said
petition contained, for answer thereto, or so
much thereof as this defendant is advised
is material or necessary for him to make answer
to, answering saith:

That on or about the first day of January
AD 1857, the time at which it is alleged in the
petition filed herein the Contract was made
by some Cosum one of the defendants to said
with the said Stephen Sinsworth for the work
labor and materials set forth in said petition

for the construction of the building therein mentioned the said John Cossum was not the owner of the lot described in the petition.

This defendant further says that the petitioner herein has since the 1st day of January A.D. 1857 furnished labor and materials for other buildings for the erection of which said Cossum was a contractor, besides the building described in this petition, and from time to time payments have been made by said Cossum to said Ainsworth, and that the balance, if any, which may now be due the petitioner herein from said is due for materials furnished and work done on all the buildings for which he may have furnished labor and materials for said Cossum during the past season, and not solely for the work done and materials furnished for the particular building described in this petition.

This defendant admits that the said Cossum and his wife did make and execute a deed to this defendant on the 28th day of August last of the premises described in the said petition, but denies that a claim or lien, as set forth in the said petition existed at the time of the execution of the said deed.

This defendant herein expressly denies that any other matter or thing in said petition contained not herein sufficiently answered, confessed or denied, traversed or denied is true according to the best knowledge, information and belief of this defendant.

And now having fully answered

9

said petition this defendant asks to be dismissed hence with his reasonable costs in this suit

George Myster

By Thos. Wilkinson Attys

State of Illinois }
County of Rock Island } ss

George Myster being duly sworn, says, that the matters set forth in foregoing answers are true so far as they purport to be stated on his own knowledge, and so far as they are not so stated, he has been informed and believes them to be true.

Sworn to & subscribed

this 24th day of December }

Geo. Myster

A.D. 1857. Quincy McNeil clerk

Be it Remembered that on the 17th day of March 1858 there was filed in the office of the Clerk of the Circuit Court in the City of Rock Island and county and State aforesaid, Exceptions to the answer of George Myster which is in the words and figures following to wit.

Stephen Vincowth

vs

John Cassum &
George Myster

R.C. Cir Ct

March 8 1858

And the said petition comes and excepts to the answer of Deft George Myster filed herein and says the same is irrelevant, immaterial, immaterial and evasive, is not full, complete, and specific

and is otherwise insufficient to be replied unto,
wherefore &c

Wilkinson & Pleasants

Attys for Pltfs

And for causes of exception the petitioner
assigns the following

- 1 The said dft does not answer all the allega-
tions of the petition material or proper to be
answered unto by law.
- 2 He does not answer fully and specifically
upon his knowledge or his information & belief
- 3 He does not specifically admit or deny all
the material allegations of said petition.
- 4 The said answer is otherwise insufficient

Wilkinson & Pleasants

Attys for Pltfs

And afterwards to wit on the 18th day of March
1858 a replication was filed in the office of
the Clerk of the Circuit Court in the City of
Rock Island and county and State aforesaid
in the words following to wit

State of Illinois } Of the March Term A.D. 1858 of
Rock Island County } the Rock Island County Circuit Court

Stephen Hinzworth }

vs

John Cossum et al }

Replication

The said complainant
reserving to himself all advantage of exception
to the many insufficiencies of the said answer,
for replication thereto saith that his will aver
and prove to be true his said petition to be true
certain and sufficient in the law to be
answered unto, and that the 2^d answer

of the said defendant is uncertain, untrue and insufficient to be replied unto by this complainant. Without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or denied, traversed or ~~averred~~ denied is true, all which matters and things this complainant is and will be ready to aver and prove as the Hon Court may direct, and prays as in and by his said petition he has already prayed. Wilkinson & Pleasants
for Complr

And afterwards to wit before the judge aforesaid at the September term 1858 of said Court and on the 14th day of said term being the 28th of September 1858 the following proceedings were had.

Christopher Atkinson & Elisha Reynolds
Partners & Atkinson & Reynolds
vs

John Cassum & George Myster

John Harper & Alexander Steel
Partners & Harper & Steel
vs

John Cassum & George Myster

Robert Graham
vs

John Cassum & George Myster

Stephen Amersforth
vs

John Cassum & George Myster

Mechanics Lien

Charles Le Gorman

vs

John Cossam & George Myster } At this day came
 the above named complainants by Wilkinson
 & Pleasant and R M Marshall their solicitors
 and the defendant George Myster by Knox &
 Wilkinson and Beardsley & Smith his solicitors
 and the defendant John Cossam having been
 three times duly served with process of sum-
 mons herein and being three times solemnly
 called came not but made default. It is there-
 fore ordered and decreed by the Court that the
 petitions of the said several respective complain-
 ants to be taken as confessed as against him.
 And the exceptions filed by the said several
 complainants to the several answers of the
 said defendant George Myster coming on now
 to be heard by the Court and being argued by the
 counsel and by the Court duly considered
 the said exceptions number one and two
 are sustained and on motion of said defendant
 Myster leave is given him to file amended an-
 swers in said several causes and the said
 causes are now continued.

And afterwards to wit on the 12th day of Decem-
 ber 1858 there was filed in the office of the Clerk
 of the Circuit Court in the county and State
 aforesaid the amended answer of George Myster
 which was and is in the words and following
 State of Illinois }
 Rock Island County } ss
 (12)

Rock Island Circuit Court
December Term 1858

To the Hon. J. Wilson Drury, Judge of the
Sixth Judicial Circuit in the State of Illinois.

The amended answer of George Mytton
one of the defendants to the petition Stephen
Sincere the complainant

This defendant, now and at all times hereafter,
saying to himself all and all manner of bene-
fit or advantage of exception or otherwise that
can or may be had or taken to the many errors,
uncertainties, and imperfections in the said petition
contained, for answer thereto, or so much thereof
as this defendant is advised is material or neces-
sary for him to make answer to, answering with,

That the work and materials set forth in the
said petition and the schedule thereto attached
marked "A" as furnished by the petitioner in and
about the dwelling therein mentioned, if furnished
at all, were not furnished by the petitioner to
John Cossum, one of the defendants to this bill,
by contract with the said Cossum, made
on or about the 1st day of January A.D. 1857,
as the owner at that time of the part of the
lot described in the said petition to wit, the west
half of the west half of Lot No one (1) in Block
No. nineteen (19) in that part of the City of
Rock Island known as the old or original town.

Nor were they furnished, if furnished at all,
by the said petitioner in and about the said
dwelling house by contract with the said Cossum
made at any other time when the said Cossum
was owner of said lot & part of lot. And that

the said Cossum was not on the on the 1st day of January 1857, nor at any other time when he made a contract with the said petitioner for the labor and materials set forth in the said petition and the schedule thereto attached marked "A" the owner of said lot or part of a lot.

This defendant further says, that the petitioner herein has since the 1st day of January AD 1857 furnished labor and materials for other buildings for the erection of which the said Cossum was a contractor, besides the building described in this petition, and from time to time payments have been made by the said Cossum to the petitioner herein, and that the balance, if any, which may now be due to the petitioner herein from said Cossum, is due for materials furnished and work done on all the buildings for which he may have furnished labor and materials during the year 1857, and not solely for the work done and materials furnished for the particular building described in the petition herein.

This defendant admits that the said Cossum and his wife did make and execute a deed to this defendant on the 28th day of August 1857 of premises described in the said petition, but denies that any claim or lien, as set forth in the said petition, existed at the time of the execution of said deed.

This defendant herein expressly denies that any other matter or thing in said petition contained, not herein sufficiently answered,

confessed, avoided, traversed or denied is true according to the best knowledge, information and belief of this defendant.

And now having fully answered said petition, this defendant asks to be dismissed hence with his reasonable costs in this suit.

Wm. Wilkinson

for Defr

State of Illinois }
Rock Island County } ss

George Winter being duly sworn, says that the matters set forth in the foregoing answers are true so far as they purport to be stated on his own knowledge, and so far as they are not so stated, he has been informed and believes they are true.

Sworn to & subscribed this } Geo. Winter
14th day of December AD 1858 }

Quincy McNeil clk

X The final decree in this case is the same as in the case of Harper & State vs John Coesum & George Winter and there is but one record of such final decree. E. H. Bowman clk
State of Illinois } ss.

Rock Island County } J. Edward H. Bowman

clk of the Circuit Court, within

and for said County and State aforesaid, hereby certify that the foregoing is a true full & complete transcript of the Record of proceedings had in said cause in said Circuit Court, as also a full complete and true copy of the several original papers on file therein as entire as the same now remain of Record, or on file in my office.

In testimony whereof I have hereunto set my hand & affixed the seal of said Circuit Court at Rock Island this 20th day of March AD 1863.

Edward H. Bowman clk.

~~242~~ 125

Cozzum

25

Ainsworth

Record

Filed April ^{23^d} ~~29~~ 1863
L. Leland
Clerk

\$4.75 fees -
P. E. H. B.

Supreme Court of Illinois
Third Grand Division
April Term A.D. 1864

George Mixer
Impleaded &c

vs.
Stephen Sinsworth

} Plaintiff in error
Error to Rock Island
} Defendant in Error

And now comes The said George Mixer, by Knox & Reed, his attorneys, and says there is manifest error in the record and proceedings aforesaid, and in the rendition of the decree aforesaid in manner and form aforesaid, in this, to-wit:

1st The Court erred in overruling the demurrer of the plaintiff in error to the petition of the defendant in error.

2nd The Court should have sustained said demurrer and dismissed the petition

3rd The Court should have dismissed said petition, for the reason that the same is insufficient to give the court jurisdiction

1st The Court erred in rendering the decree for
defendants in error in manner and form
aforesaid

That & Reed
Attorneys for Plaintiff in Error

125-43
George Winton
vs
Stephen Griswold
Assignment of
Errors

Ernest Gulue July 9
1864
J. Leland C.M.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1863. }

GEORGE MIXTER, Impleaded, &c.

Plaintiff in Error,

v s.

John Harper and Alexander Steele,

Defendants in Error.

ERROR TO
ROCK ISLAND.

ABSTRACT OF RECORD.

Rec. p. 1 PETITION filed November 5th, 1857.

- 2 PETITION for a Mechanic's Lien upon west half of west half of lot one, in block 19, in old town of Rock Island, alleges that on or about the first day of April, 1857, one John Cossum, the owner of said premises, made a contract with defendants in error, whereby they agreed to furnish
- 2 moneys and materials necessary and proper in and about the digging the cellar, and for the masonry for the foundation of a brick house to be erected on said premises; and for flooring, lumber and other materials, and for nails, &c., and other hardware and materials used in, and proper for, said house, as set forth in an account annexed to said petition.

For which materials the said Cossum agreed to pay defendants in error their reasonable worth and value *on request* ; that they, defendants in error, furnished materials, and money in the procurement of materials, in and about the erecting and building of said house according to said account ; that the reasonable worth and value thereof was \$140,33, which
3 he (Cossum) agreed to pay defendants in error *on request* ; that said Cossum had not paid any part thereof ; that Cossum, on the 28th day of August, 1857, conveyed said premises to plaintiff in error by deed therefor ; that the title conveyed by said deed, is subject to claim for a lien
3 of defendants in error.

4 PRAYER of petition for a mechanic's lien on said premises, to pay said sum of \$140,33.

5 COPY of said account.

6 SUMMONS and return of service by sheriff of Rock Island county.

7, 8 DEMURRER of plaintiffs in error to the petition of defendants in error.

8 ORDER of the court overruling the demurrer aforesaid.

9 ANSWER of plaintiff in error to the petition.

Answer denies that Cossum was the owner of the premises as alleged in the petition.

10 Alleges that a large portion of the claim of defendants in error is for money advanced and not for labor and materials ; denies that the claim of defendants in error is just ; denies that the defendants in error furnished labor and materials as alleged in said petition. Admits the conveyance of said premises to plaintiff in error as alleged in said petition.

11 AFFIDAVIT of truth of answer.

12 EXCEPTIONS to answer of plaintiff in error.

14 Consent that plaintiff in error file an amended answer.

17, 18, 19 AMENDED ANSWER substantially like the original, above referred to.

16 Exceptions one and two to amended answer sustained.

20 FINAL DECREE.

This decree, by agreement, is made in the several cases for mechanic's lien, as follows, to-wit :

Harper & Steele vs. John Cossum and George Mixter.

Atkinson & Reynolds vs. " "

Robert Graham vs. " "

Stephen Ainsworth vs. " "

Charles C. Toomer vs. " "

21 Decree recites, that the several causes above named were heard by the court, upon testimony produced to the court, upon the several petitions taken as confessed against Cossum, and the answers of plaintiffs in error, and the replications thereto, without a jury ; that the court found a decree in favor of defendants in error, Harper & Steele, for \$188,69 ; in favor of Atkinson & Reynolds for \$603,57 ; in favor of Robert Graham for \$182,09 ; in favor of Stephen Ainsworth for \$71,10.

21 The decree provides that the defendants in error (with others) have a lien on said premises for the amount found due them ; and that the said
22 premises be sold by the sheriff of Rock Island county, under a special execution to be issued to him for that purpose.

No time is fixed by the decree for the sale.

23 CERTIFICATE of the clerk to the record.

ASSIGNMENT OF ERRORS.

And now comes the said George Mixter, by Knox & Reed, his attorneys, and says there is manifest error in the record and proceedings aforesaid, and in the rendition of the decree aforesaid in manner and form aforesaid, in this, to-wit :

1. The court erred in overruling the demurrer of the plaintiff in error to the petition of defendants in error.

2. The court should have sustained said demurrer and dismissed the said petition.

3. The court should have dismissed said petition, for the reason that the same is insufficient to give the court jurisdiction.

4. The court erred in rendering the decree for defendants in error in manner and form aforesaid.

KNOX & REED,
Attorneys for Plaintiff in Error.

Brief and Points for Plaintiff in Error.

The petition for a mechanic's lien, filed in this cause, is manifestly insufficient to give the court jurisdiction, for the reason that *no time was fixed* in which the money and materials mentioned in said petition were to be delivered. The petition *entirely fails* to show that any time was fixed for the furnishing or delivery of the money or materials.

This is a fatal defect in the petition.

In the case of *Phillips vs. Stone, et. al.*, 25 Ill. 81, this Court says :

"They (meaning parties who endeavor to enforce liens) must show in their pleading, a time within which the contract was to be performed by the agreement, and the time when the money was to be paid, as limited by the act ; and on the hearing, these allegations must be proved."

See cases then cited.

On page 169, of the 25 Ill., two cases are described, where the Court says :

"The petitions in both these cases present the same defect which we have so often described to be fatal. They state no time within which the contracts were to be performed, as is required by the statute."

In the case of *Scott et. al. vs. Keeling*, 25 Ill. 358, the Court says:

"The petition in this case is insufficient. Both the petition and proof show that no time was specified by the contract within which it should be performed."

In *Moser vs. Matt et. al.*, 24 Ill. 198, the Court says:

"It is essential a definite time shall be alleged for the completion of the work. We cannot imply a time."

In the case of *Cook et. al. vs. Heald et. al.*, 21 Ill. 430, the Court says:

"Again, the petition should have averred a time when the contract was to be performed by the agreement, and the time when the money was to be paid, within the times severally limited by the act, as these facts are material to a proper understanding by the Court, of the rights of the parties."

The above quotations are fully sustained by the following authorities: 21 Ill. 431; do. 437; 22d do. 252; 23 do. 79; *ibid.* 473.

The petition is also fatally defective, for the reason that it fails to show that any *time* was *fixed* for the *payment* for the materials furnished.

The authorities above cited all agree that a lien cannot be enforced where no time was fixed for the payment for materials furnished or labor performed. See cases before cited.

The petition alleges that the material furnished were to be paid for by Cossum, *on request*.

This is not sufficiently definite to comply with the decisions cited, which unequivocally declare that the time for payment must *be fixed definitely* by the contract; and which time must be within one year from the completion of the work.

(6)

The request could be lawfully made in one month, or in one year, or in five years ; and Cossum was under no obligation to pay until a request was made.

The decree in this case is unlawful, for the reason that a sale of the premises by the decree might be made at any time, as soon as the proper advertisement could be made.

The only clause in the decree which refers to the time of sale, is as follows, to wit. : " and that special execution, with a copy of the decree, "issue to the sheriff of Rock Island county for the sale thereof."

So the sale might have been made in twenty days after the decree was rendered.

This was error, most clearly.

Link vs. Architectural Iron Works, 24 Ill, 551.

Claycomb vs. Cecil, 27 Ill. 497.

For the foregoing reasons upon the points made, we think the decree in this cause should be reversed.

KNOX & REED,
Attorneys for Plaintiff in Error.

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Abstract and

Brief of Plff. in error

Filed Apr 24 1863

L. L. Loomis CM