


No. 8653

Supreme Court of Illinois

Fielder Power et al

vs.

Reubin C. McCord et al

71641  7

State of Illinois,
SUPREME COURT,
First Grand Division.

} SS

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Saline Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Saline county, before the Judge thereof between George H. Evercole & James M. Laca ~~impleaded with~~ Reuben C. McCann & Co. plaintiffs and John M. Guyson & William H. Benton ~~impleaded with~~ Jesse Power & William Norton defendants it is said manifest error hath intervened to the injury of the aforesaid ~~parties~~ Defendants as we are informed by their complaint, and we being willing that error, if any there be, should be corrected 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 our Supreme Court the record and proceedings of the pleas aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at **Mount Vernon**, in the County of Jefferson, on the 1st Sunday after the 2^d Monday in November 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. P. H. Walker Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this eleventh day of October in the year of our Lord one thousand eight hundred and sixty four.

Noah Johnston
Clerk of the Supreme Court.

24
SUPREME COURT.
First Grand Division.

John W. Grayson et al.
H. H.

Plaintiffs in Error,

vs.

Georg H. Evered et al.
H. H.

Defendants in Error.

WRIT OF ERROR.

Issued FILED. Cert.
11-1864.

A. Johnston Clerk
11

State of Illinois,
SUPREME COURT,
First Grand Division.

To the Clerk of the Circuit Court for the County of *Christian* Illinois,
Greeting:

[Faint, mostly illegible handwritten text, likely the body of the writ or a related document.]



Supreme Court
State of Illinois
First Grand division

John C. Martin
John W. Grayson and
William H. Benton

impleaded with
Fielden Damon & William Boston
Power & Co below
vs.

George H. Eversole & James
Ward impleaded with
Ruben C. McCord & Co
Ruben Peffs below

Errors to
Clinton

The Clerk will please
Issue a writ of Error against
George H. Eversole & James Ward
defts in above entitled Cause directed
to Sheriff of Clinton County Ills Returnable
to the same on 2^d of June 1864 of Supreme
Court first Grand division

Stoken W. Underwood
attys for Peffs

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J. W. Grayson et al.

vs

G. H. Coombs et al.

Receipt

Given, Oct. 11. 1864

to Johnston Co

In Supreme Court---1st Grand Division, in the State
of Illinois.

JOHN C. MARTIN, et al.

vs.

EVERSALE & McLEARD.

} ERROR TO CLINTON.

BRIEF OF DEFENDANTS.

1st. After the elapse of several years from the making a verbal contract, proof minute and in every particular exact will not be expected, and it is sufficient to prove the contract substantially as alleged either by direct evidence, or by circumstantial evidence coroborative of the direct proof. This it is believed the bill of exceptions in this case will sustain.

2d. Substantial justice has been done on a view of the whole case: the law and facts were before the jury. Their virdict ought to stand unless it be manifestly wrong.

H. K. S. O'MELVENY for Deft's. in error.

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A B S T R A C T.
IN THE SUPREME COURT OF THE STATE OF ILLINOIS,
FIRST GRAND DIVISION.

NOVEMBER TERM, A. D., 1864.

FIELDER POWER, WILLIAM MORTON, *et al.* }
VS. }
REUBEN C. McCORD, *et al* Interpleader of } BILL FOR
George H. Eversol and James McLaird. } MECHANIC'S LIEN.

1 Answer of Eversol and McLaird to original bill of R. C. McCord *et al* alleges partnership of Eversol and McLaird, that they are Mechanics and Material men, and as such, on the 27th day of December, 1859, they, by contract with Power and Morton, doing business under that style and name, agreed to furnish labor and material for the erection and construction of mill and building on land described in Complainant's bill, as follows: G. H. Eversol, Mill Wright, commencing Dec. 27th, 1859, and ending June 25th, 1860, 155 days' at \$5 per day, \$775,00. Labor of under Mechanics, commencing Dec. 27th, 1859, and ending June 25th, 1860, at \$2,50 per day, \$337,50, to be paid weekly; also material, Bolts and Washers, at \$54,48; and drayage.

2 Alleges Fair and Freight and Wrench, \$7,90. That the contract amounted to \$1612,68, in all; avers labor and material were performed and furnished and delivered for the purpose aforesaid and at the times therein mentioned and for which Power and Morton agreed to pay the price therein carried out, weekly, on Saturday evening of each week, after the commencement of said work. Avers the labor and material were performed, used and furnished in the erection of said Mill and Buildings on premises, as agreed upon with Power and Morton, and at times in bill mentioned; avers all allegation of facts in Complainant's original bill are true, and pray that lien which Eversol & McLaird claim to have on Mill be allowed, and they come in pro rata with Complainants for the relief sought, to the amount of \$1612,68.

3 States Petition of Eversol & McLaird was amended, on 1st page the following words were added, to be paid weekly, on 3rd, 6th and 9th lines from the bottom and 2nd page, 8th line from top, after words carried out, read weekly to wit, every Saturday evening of each week and 25th June, 186, when work completed. Then there is copy of bill of items as stated above, with time when work commenced, 27th Dec., 1859, and ended, 25th of June, 1860.

4 Avers total amount due, \$1612,68. Then follows answer of John C. Martin, J. W. Grayson, W. H. Benton, interpleaded to amended bill of Eversol & McLaird. Answer denies that on the 27th of December, 1859, Eversol & McLaird made contract with Power & Morton, at their request for labor and material for Mill and Building, described in original bill of McCord, *et al.*

5 The answer denies that by contract Eversol was to work 155 days at \$5 per day as Mill Wright on said Mill; denies that he commenced on the 27th of December, 1859 and ended 25th June 1860; distinctly denies that Power & Morton entered into any contract with Eversol and McLaird to furnish under Mechanics for 155 days each; and denies that they commenced the 27th of December, 1859 and ended 25th of June 1860; denies that Complainants furnished any material; denies that Power & Morton agreed to pay Eversol \$5 per day, and under Mechanics \$2,50 per day, for 155 days; denies that by terms of contract they agreed to pay Eversol and McLaird at the prices as by them carried out, at the end of each week, as stated in bill.

6 The Replication of Complainants in usual form, order of Court making various parties defendants by interpleader.

7 Order of Court overruling demurrer to interpleader of Eversol & McLaird rule to answer same. The Defendants refile answer of Power & Morton and the cause submitted to Jury. Verdict of Jury \$1250 for Complainants. Motion for new trial, motion overruled, Defendants file bill of exceptions and pray and appeal to Supreme Court, which is allowed. Judgement on verdict for \$1250 and costs.

BILL OF EXCEPTIONS.

EVERSOL & McLAIRD, interpleaded) with R. C. McCORD, <i>et al.</i> <i>vs.</i> POWER & MORTON, <i>et al.</i>)	Mechanics Lien, in Clinton Circuit Court.
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That at March Term, 1864, of Clinton Circuit Court, State of Illinois, on 15th day March, cause was tried by Court and Jury on petition, answers and replication and evidence of witnesses on part of Eversol & McLaird. Z. Case states Mill is on land described in original bill, knows nothing of contract. A. Sharp states had conversation with Morton, who told him they, Power & Morton, employed Eversol to do mill wright work on Mill. This was a short time before Eversol commenced work, was in fall of 1859. Eversol & McLaird were in Partnership. I understood contract was made with firm. Morton told me he gave Eversol \$5 per day and under-workmen \$2.50; that was in 1859 or early in 1860, don't know when. Eversol commenced work, think it was in the latter part of 1859. They worked during winter and spring and part of summer, and quit work before harvest some time, cannot fix time more certain. Think first conversation was a short time before commencing work. They calculated to get Mill to running before harvest, but did not. Think contract was made before Christmas. Commenced work last of 1859 or early in 1860. Eversol went to St. Louis several times, do not know how long he staid, was back again at work soon, 10 per cent I think a fair estimate of loss of time, for man who has a family at St. Louis as Eversol had. Don't know that Eversol went to St. Louis on business for Power & Morton. Think Morton told him that they were to commence work immediately don't know that any time was fixed for finishing the work.

M. Blackwell states that Power & Morton said they had to pay their men every Saturday evening. The contract was made in the fall of 1859 and they commenced work late in the fall. They commenced work before Christmas of 1859 and quit the 1st or 2nd day of July 1860. The workmen boarded with me near three months. Eversol, J. and C. Moodys, Wilcox and Baldwin worked on Mill. The Moodys worked for Eversol. Power & Morton told him was to pay Eversol \$5 per day and Moodys \$2.50 per day, and was to pay every Saturday night. Can't tell how many days they worked, don't think Moodys lost a day during the time they boarded with me.

Eversol had family in St. Louis, and did not work every day, went to St. Louis frequently of Saturdays and came back Mondays by dinner. Did not finish Mill. Eversol showed me writing, from Power he said, which was his order to quit. Commenced the work some ten days or a week before Christmas. They told me they had to pay the Mill hands every Saturday. This was all the evidence and Defendants rested the case. The Court gave following instructions for Complainants :

1st. That if the Jury believe from the evidence that the articles were contracted for the Mill of Power & Morton at Carlyle, and that Plaintiffs have identified the land, then so far as that point is concerned, it is sufficient, and if you believe that all the other material allegations in the petition are proved then Defendants are entitled to recover.

2nd, That if you believe that the terms of the contract are either admitted by the Defendants or proved by the evidence, as required by the instructions for Defendant, and that the articles were delivered as soon as the House and Mill Wright were ready to receive them, then Defendants are entitled to recover to the amount of contract price.

3rd, That it is only necessary to prove the contract in substance and if the Jury believe that the Defendants have so proved their contract as alleged, then Plaintiffs are entitled to recover the delivery and other facts necessary being found proved.

4th, That when the contract is silent as to time when payment is to be made, then payment is due upon delivery or tender of the article to be delivered.

5th, The Court instruct the Jury, that if you believe, from evidence, that Plaintiffs substantially proved contract to commence labor on Mill as mentioned, and they did the labor under contract, you should find for Plaintiffs such sum as labor may be shown to amount to, at price agreed upon.

6th, The Court further instruct, that a contract may be proved by facts as substantially show agreement of parties and if Defendants in case have substantially shown their contract as charged in petition, the price agreed on and when it should be paid, then you should find for Defendant such amount as may be due them for labor at price agreed to be paid.

7th, That all admissions in Power's answer are evidence for Plaintiffs.— Instructions then and there excepted to by Defendants. Court gave for Defendants the following instructions:

1st, Unless Eversol & McLaird have proved a contract for work was made as alleged, the Jury are bound to find for Defendants.

2nd, Unless is proved that on the 27th of December, 1859, Eversol was to commence and did commence as alleged, then the Jury should find for Defendants.

3rd, Unless it has been proved that Eversol quit work on the 25th day of June, 1860, as alleged, Jury should find for Defendant.

4th, If Jury believe from evidence, Eversol was to be paid \$5 per day for self and \$2,50 per day for his hands, payable every Saturday, and no time fixed when work should end, and that contract was not asstated in petition, then Jury should find for Defendants.

13 5th, If Jury believe from evidence, that Eversol did not complete contract as originally made, but was stopped by Power & Morton then contract is not proved as alleged and Jury should find for Defendants.

6th, In order for Plaintiffs to recover in this case, he must, in all material points denied by Power & Morton, overcome same either by two witnesses to contrary or one witness and corroborating circumstances to contrary.

7th, Unless the several contracts in relation to furnishing articles sued for has been proved substantially as stated by Plaintiffs, Jury should find for Defendants.

14 8th Unless Plaintiffs have proved that by contract between Power & Morton and Plaintiffs, the materials sued for was furnished for building on lot described in bill the verdict shou'd be for Defendants.

Jury returned verdict for Defendants \$1250. Motion for new trial. 1st, beacuse verdict contrary to instructions of Court, to law and evidence.

15 Contract proved varied from that alleged, 1st, In time when work was to commence. 2nd, In time it was to end. 3rd, In fact, there was no proof that McLaird had anything to do with the contract. 4th, There was no proof that Eversol & Co was to furnish material. 5th, In fact, there was no proof that Eversol & Co was to work 155 days. Motion refused by Court. Bill of exceptions signed and sealed.

Clerk's Certificate of true copy of record, in usual form.

16 COPY OF SPECIFICATIONS.

McCord, et al. }
vs. } Petition for Mechanic's Lien.
Power & Morton, et al. }

For purpose of saving costs in copying the record in this case, it is hereby expressly stipulated that the original record of the proceedings in this cause as copied in the same, now pending in the Supreme Court of Illinois, shall be taken and considered as a part of the record in the case presented to reverse the order and judgment on the Interpleader, on behalf of Eversol & McLaird, and that it shall only be necessary in last case, to copy petition of Interpleader of Eversol & McLaird, the answer and Replication thereto, the order of Court as to their Interpleader and the bill of exceptions filed in relation to the trial of their claim.

STOKER & UNDERWOOD,

Attys. for Pomroy & Benton.

H. K. S. OMELVENY,

Atty. for Eversol & McLaird.

It is now assigned for error. 1st, The Court below erred in overruling the motion for a new trial. 2nd, In rendering a judgment for \$1250, without ordering a sale of the premissis on which the lien is sought to be enforced. 3rd, In not ordering this lien to be subject to the distributive share with other liens of Mechanics standing on same premissis. 4th, The judgment is uncertain, informal and indefinite, and insufficient as a judgment or decree in Mechanics lien.

BRIEF.

VARIANCES.—The Case and Contract as alleged must be proved 21 Ills. R 625, 23 Id. 64 62 Seam R 216, 13 Ills R 386. Gilm. R 425 5 Id. 566.

Bill on Interpleader alleges that contract was made on 27th of December, 1859, and work commenced on that day, contaret was for 155 days work, and to end 25th of June, 1860. Evidence is, contract was made late in the fall and work commenced ten days or a week before Christmas. No proof as to how long was to work or as when was to quit. Evidence is, they quit 1st or 2nd day of July, 1860.

The answer of Defendants denying the contract as alleged, could not be overcome by one witness alone, as to those points 1 Gilm. R 634, 24 Ills R 24.

It is apparent from proof, that it was no part of the contract for the materials and labor, that same should be put on this particular tract of land and therefore there can be no lien on same, 24 Ills. R 522, 25 Id. 349.

The Interpleader of Eversol & McLaird alleges that their contract was to furnish labor and material for the erection and co struction of Mill and Building. Proof is, that they contracted to do mill-wright work only.

There is no order of sale of property nor time in which the same may be redeemed from sale.

STOKER & UNDERWOOD,

Atty. for ~~Def.~~ in Error.

J. W. Gayson *et al*

H ^{vs}
G. H. Everett *et al*

Abstract

Filed, Oct. 11-1864.
N. Johnston, *cl*
11

In Supreme Court---1st Grand Division, in the State
of Illinois.

JOHN C. MARTIN, et al.

vs.

EVERSALE & McLEARD.

} ERROR TO CLINTON.

BRIEF OF DEFENDANTS.

1st. After the elapse of several years from the making a verbal contract, proof minute and in every particular exact will not be expected, and it is sufficient to prove the contract substantially as alleged either by direct evidence, or by circumstantial evidence coroborative of the direct proof. This it is believed the bill of exceptions in this case will sustain.

2d. Substantial justice has been done on a view of the whole case: the law and facts were before the jury. Their virdict ought to stand unless it be manifestly wrong.

H. K. S. O'MELVENY for Deft's. in error.

[Faint handwritten notes and signatures in blue ink, including a large '5' and a circular stamp.]

~~Martin et al~~
vs

~~Everdale and McLeod~~

Martin J.C.

vs

Everdale and McLeod

per Brief

8653

Julia, Nov. 24. 1864.
A. Johnston Clk

to the jury. Their verdict ought to stand unless it be manifestly wrong.
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This it is believed the bill of exceptions in this case will sustain.

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EVERDALE & McLEOD,

vs
JOHN C. MARTIN, et al.

ERROR TO CINTON.

of Illinois.

In Supreme Court—1st Circuit Division, in the State

ABSTRACT.

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FIRST GRAND DIVISION.

NOVEMBER TERM, A. D., 1864.

FIELDER POWER, WILLIAM MORTON, *et al.*
VS.
REUBEN C. McCORD, *et al* Interpleader of
George H. Eversol and James McLaird. }

BILL FOR
MECHANIC'S LIEN.

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2 Alleges Fair and Freight and Wrench, \$7.90. That the contract amounted to \$1612.68, in all; avers labor and material were performed and furnished and delivered for the purpose aforesaid and at the times therein mentioned and for which Power and Morton agreed to pay the price therein carried out, weekly, on Saturday evening of each week, after the commencement of said work. Avers the labor and material were performed, used and furnished in the erection of said Mill and Buildings on premises, as agreed upon with Power and Morton, and at times in bill mentioned; avers all allegation of facts in Complainant's original bill are true, and pray that lien which Eversol & McLaird claim to have on Mill be allowed, and they come in pro rata with Complainants for the relief sought, to the amount of \$1612.68.

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7 Order of Court overruling demurrer to interpleader of Eversol & McLaird rule to answer same. The Defendants refile answer of Power & Morton and the cause submitted to Jury. Verdict of Jury \$1250 for Complainants. Motion for new trial, motion overruled, Defendants file bill of exceptions and pray and appeal to Supreme Court, which is allowed. Judgement on verdict for \$1250 and costs.

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with R. C. McCORD, *et al.*
vs.
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Mechanics Lien,
in Clinton Circuit Court.

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1st. That if the Jury believe from the evidence that the articles were contracted for the Mill of Power & Morton at Carlyle, and that Plaintiffs have identified the land, then so far as that point is concerned, it is sufficient, and if you believe that all the other material allegations in the petition are proved then Defendants are entitled to recover.

2nd, That if you believe that the terms of the contract are either admitted by the Defendants or proved by the evidence, as required by the instructions for Defendant, and that the articles were delivered as soon as the House and Mill Wright were ready to receive them, then Defendants are entitled to recover to the amount of contract price.

3rd, That it is only necessary to prove the contract in substance and if the Jury believe that the Defendants have so proved their contract as alleged, then Plaintiffs are entitled to recover the delivery and other facts necessary being found proved.

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6th, The Court further instruct, that a contract may be proved by facts as substantially show agreement of parties and if Defendants in case have substantially shown their contract as charged in petition, the price agreed on and when it should be paid, then you should find for Defendant such amount as may be due them for labor at price agreed to be paid.

7th, That all admissions in Power's answer are evidence for Plaintiffs.—Instructions then and there excepted to by Defendants. Court gave for Defendants the following instructions:

1st, Unless Eversol & McLaird have proved a contract for work was made as alleged, the Jury are bound to find for Defendants.

2nd, Unless is proved that on the 27th of Decemher, 1859, Eversol was to commence and did commence as alleged, then the Jury should find for Defendants.

3rd, Unless it has been proved that Eversol quit work on the 25th day of June, 1860, as alleged, Jury should find for Defendant.

4th, If Jury believe from evidence, Eversol was to be paid \$5 per day for self and \$2,50 per day for his hands, payable every Saturday, and no time fixed when work should end, and that contract was not asstated in petition, then Jury should find for Defendants.

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14 8th Unless Plaintiffs have proved that by contract between Power & Morton and Plaintiffs, the materials sued for was furnished for building on lot described in bill the verdict should be for Defendants.

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Clerk's Certificate of true copy of record, in usual form.

16 COPY OF SPECIFICATIONS.

McCord, et al.

vs.

POWER & MORTON, et al.

} Petition for Mechanic's Lien.

For purpose of saving costs in copying the record in this case, it is hereby expressly stipulated that the original record of the proceedings in this cause as copied in the same, now pending in the Supreme Court of Illinois, shall be taken and considered as a part of the record in the case presented to reverse the order and judgment on the Interpleader, on behalf of Eversol & McLaird, and that it shall only be necessary in last case, to copy petition of Interpleader of Eversol & McLaird, the answer and Replication thereto, the order of Court as to their Interpleader and the bill of exceptions filed in relation to the trial of their claim.

STOKER & UNDERWOOD.

Attys. for Pomroy & Benton.

H. K. S. OMELVENY,

Atty. for Eversol & McLaird.

It is now assigned for error. 1st, The Court below erred in overruling the motion for a new trial. 2nd, In rendering a judgment for \$1250, without ordering a sale of the premises on which the lien is sought to be enforced. 3rd, In not ordering this lien to be subject to the distributive share with other liens of Mechanics standing on same premises. 4th, The judgment is uncertain, informal and indefinite, and insufficient as a judgment or decree in Mechanics lien.

BRIEF.

VARIANCES.—The Case and Contract as alleged must be proved 21 Ills. R 625, 23 Id. 64 62 Scam R 216, 13 Ills R 386. Gilm. R 425 5 Id. 566.

Bill on Interpleader alleges that contract was made on 27th of December, 1859, and work commenced on that day, contaret was for 155 days work, and to end 25th of June, 1860. Evidence is, contract was made late in the fall and work commenced ten days or a week before Christmas. No proof as to how long was to work or as when was to quit. Evidence is, they quit 1st or 2nd day of July, 1860.

The answer of Defendants denying the contract as alleged, could not be overcome by one witness alone, as to those points 1 Gilm. R 634, 24 Ills. R 24.

It is apparent from proof, that it was no part of the contract for the materials and labor, that same should be put on this particular tract of land and therefore there can be no lien on same, 24 Ills. R 522, 25 Id. 349.

The Interpleader of Eversol & McLaird alleges that their contract was to furnish labor and material for the erection and construction of Mill and Building. Proof is, that they contracted to do mill-wright work only.

There is no order of sale of property nor time in which the same may be redeemed from sale.

STOKER & UNDERWOOD,

Atty. for Defs. in Error.

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J. W. Grayson *em*

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G. H. Eversole *em*

Abstract

Friday, Oct. 11. 1864.

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