No. 8538

Supreme Court of Illinois

Donaldson et al

vs.

Holmes et al

71641 7

State of Illinois } ss
Pulaski County }

Pleas at Mound City, before the Circuit Court of said County, on Monday the Eleventh day of April, in the Year of our Lord One thousand eight hundred and fifty nine

Be it remembered, that heretofore, to wit, on the 16th day of Decr, in the Year one thousand eight hundred and fifty eight, came James Holmes and Niles G McKown partners &c by William Hunter their Attorney, and filed their Petition for Mechanics Lien against John Donaldson and the Empornum Real Estate and Manufacturing Company Defendants, which said Petition is in these words,

State of Illinois } Circuit Court April
Pulaski County } Term AD 1859

Petition for Lien

To the honorable Nelson Sloan Judge of the Circuit Court of Pulaski County State of Illinois in Chancery Sitting. Your Petitioners James Holmes and Niles G McKown partners in trade under the name and style of Holmes and McKown respectfully represent to your honor that on or about the 26th day of April AD 1857 John Donaldson for formerly of this State but not now a resident of the State of Illinois being the owner of the premises hereinafter described

[8538-1]

Petition
Continued

(2)

"Namely lot number 39 in block number
"4 range 1, in Dimmick's plat of
"Mound City in the County of Pulaski and
"State of Illinois, then and there entered
"into a contract with your said Petitioners
"by which contract your Petitioners agreed
"to build and erect for the said John
"Dendson fr to the extent herein specified
"and furnish the materials therefor, a house
"on lot 39 of range one in block 4 a
"frame building two stories high to be
"set on blocks the height of the grade
"of the City - feet long by twenty
"two feet wide from east to west, with
"seven windows, frames & contain
"twelve lights 10 by 14 glass, with two
"back doors and one outside stairway
"to the 2d story, and three sets of sash
"doors in front, the gable end front
"to be run up square, to this extent
"your petitioners were to rain weather
"board and put underpoot the
"said house by or before the first
"sale of lots 1857 of the Embarrass
"Real Estate and Manufacturing
"Company and the said John Dendson
"Alderson fr in consideration thereof
"of thereby promised and agreed
"to pay upon the completion of the
"work above specified as or before
"the said first sale the sum of Five
"hundred dollars, and upon the
"payment thereof the said Holmes &
"McKenzie further bound themselves
"to complete the said building and

have the same ready for occupa-
tion as soon as possible thereafter
including a blue 18 inches square
running up through the centre of
the house, a plank partition in
each story in the centre of the building
so as to make each room the same
size with a door in each partition,
to be plastered on one side and
and walls of the building glazed
throughout and painted on the
front attics and inside on
the frame and on the completion
thereof the said John Donaldson pr
to pay your petitioners ten hundred
dollars more Your petitioners furth-
er represent that they have by virtue
of said contract performed the labor
and furnished the materials as speci-
fied in the said contract that the
materials were used in the erecti-
on of and became a part of said bui-
ding, your petitioners further repre-
sent that the said John Donaldson p
has not paid any part of the
consideration herein specified
and that the same is still due
and unpaid, your petitioners further
represent that Empire Real Estate
and Manufacturing Company claim
title to the premises above described
your petitioners therefore pray that the
said Company above named
may be made a party defendant
to this petition and that process of summons

Co. made
party

"May issue from under the seal of this Honorable court against the said Emporium Real Estate and Manufacturing Company and that notice by publication be given to the said John Donaldson Jr. That each of the said defendants may be required to make full, true, and perfect answer to all the matters and things herein set forth, your petitioners waiving the requirements of the statute that the same should be made under oath, that they may each set forth the nature and amount of their several claims and interests in the said premises and upon the final hearing of this cause, an order for the sale of the said premises at an early day may be made and the proceeds applied to the satisfaction of the said claim of your petitioners and that Your Honor will grant such other and further relief as equity and good conscience may require

Wm Hunter Atty
for petitioners

And at another day, to wit, on the 10 day of January A.D. 1859 a writ of summons issued out of said circuit court, against the said defendants which summons, with the endorsement and the return thereon made, is in the words and figures following

Summons to wit

"State of Illinois } ss The People of the State of Illinois
"Pulaski County } To the Sheriff of Pulaski County
"Greeting We command you to summon
John Donaldson Jr and the Emporium Real

Estate and Manufacturing Company if to be found in your county to appear before the Circuit Court of Pulaski county, on the first day of the next term thereof, to be holden at the Court House in Caledonia on the Second Monday in the month of April next, to answer James Holmes and Silas L. McKewin partners in trade under the name and style of Holmes & McKewin a certain Petition in said Court filed for Mechanics Lien in Amount $500.00 against certain property mentioned and described in said Petition and hereof make due return to our said Court as the law directs

Witness, Jas M Davidge Clerk of our said Court, and the judicial seal thereof, at N Caledonia this 11 day of January A D 1859

Jas. M. Davidge Clerk

Endorsement

No 116. app
Pulaski Cir Court
April Term 59

Jas Holmes
Silas L McKewin
~
John Donaldson et al.

And afterwards to wit, on the 29th day of January A D 1859, came the Plaintiffs by Hunter their Attorney and filed in the Clerks Office of said Circuit Court a certain affidavit, which said affidavit with the endorsement thereon made, is in the words and figures, viz

(over)

[8535-3]

(5)

Holmes & Wilkins
vs
John Hendelson

Affidavit to wit

Circuit Court of Pulaski County April term AD 1859

Petition for Mechanics Lien

William Hunter attorney for plaintiff being duly sworn declares on oath that John Hendelson defendant in this cause resides out of the State of Illinois so that process cannot be served upon him He therefore prays that notice by publication be given to the said defendant of the pendency of this suit

Sworn this 29th day of January AD 1859
A W McCormick Clerk

Wm Hunter

Indorsement
No 116
Holmes & Wilkins
vs
John Hendelson
affidavit
Filed Jan 29th /59
J. M. Davidge Clerk.

Thereupon notice of publication issued from said circuit clerks office, which said notice, which said notice was duly returned and said affidavit which notice, with the publisher's certificate thereto attached, is in the words and figures following viz

State of Illinois. Pulaski Co. — Set

Notice

April Term, AD, 1859. Circuit Court,
Second Monday of the Month

James Holmes and
Isles L Wilkins

partners under the name
and style of
Holmes & McKwin
vs
John Donaldson

Petition
for
Mechanics Lien

Affidavit having been made and filed in the clerks office of the Peoria Circuit Court, showing that the defendant, John Donaldson, resides out of the State of Illinois

On said defendant is hereby notified that said plaintiffs have filed their bill for lien against certain property therein described, that process of summons therein has been issued, returnable on the 1st day of the next term of the Circuit Court of said county, to be holden at Princeville at the Court House in said County. Now unless you the said defendant shall appear on the return day of summons, the bill will be taken as confessed and such order of the court made in the premises as may be expedient

Jan 29, 1859 Jas. M. Davidge Clk

Publishers Certificate

State of Illinois, } I, Jno. A. Waugh, Publisher
Peoria County } of the "Illinois City Empire" a weekly newspaper printed and published in Illinois City, in said County, do hereby certify that the subjoined advertisement was inserted in said paper the number of times required by law, to wit; first insertion Feby 3rd 1859, 4th insertion February 24, 1859 Jno. A. Waugh Publisher

And afterwards to wit, at a Circuit Court begun and held in the Courthouse as in the caption herein before mentioned and on Thursday the Tenth day of the said term, the same being the 21st day of the said Month, came the defendants The Emporium Real Estate and Manufacturing Company, as well as the said Plaintiff, whereupon the following order of the said Court was made and entered of record viz

Thomas Holmes
Niles L Wilkins
~s
John Donaldson for & Emporium Real Estate Manufacturing Company

} Pet. for Mech's Lien

On this day came the plaintiffs, thereupon came the defendants The Emporium Real Estate & Man Co. by T. A. Green their attorney & on his motion leave to file answer by tomorrow morning is granted, and the said defendant Donaldson is called to plead by tomorrow morning

And thereafterwards on the 11th day of the term, & being the 22 day of the month the defendants The Emporium Real Estate & Manufacturing Company filed their answer, which said answer with the endorsement thereon, is in the words and figures following, viz:

Answer of Emporium Real Estate & Man Co
Holmes & Wilkins
~s
} Petition Mech's Lien Circuit Court, April Term

John Donaldson et al's A.D. 1859

Answer of the Emporium Real Estate and Manufacturing Company which has been made a party to the suit to complainants petition

Said Company reserving to itself all the imperfections, uncertainties & manifold errors contained in complainants petition, for an answer says: That before said Donaldson employed said Holmes & McKevin to furnish materials and build said house mentioned and described (and) in complainants petition, said Donaldson purchased or made a contract to purchase said lot mentioned in complainants petition, from said Emporium Company upon certain conditions, to wit, said Donaldson executed certain promissory notes to said Company as a consideration for said lot mentioned in complainants petition and for a certain other lot, in said Brownsville, to wit, lot No. 40, in block 4, in Emporium plat of said city and said Donaldson was to pay said notes as the same fell due, which was in one, two, and three years from their date which are all properly dated, and the last one will not fall due until the 17th day of April A.D. 1860, said notes were given for the sum of seventeen hundred and fifty dollars, one half of which sum said Donaldson agreed to pay for said lot mentioned in complainants petition on which said house mentioned

[8538-5]

on said petition or exceptions,

Said Company further say, that said Donaldson has never paid said notes or any one or any part thereof of said notes, and said Company also says that said Company was not to execute to said Donaldson a deed for said lot mentioned in said petition until said Donaldson would pay all of said notes. Said Company further says, that said Donaldson has no legal title to said lot, and that the legal right to the same is absolutely in said Company and said Company also says, that said Donaldson has no legal or equitable right to said lot mentioned in complainants petition - said Emporium Company also denies that said Holmes & McKevin ever complied with any contract to furnish material and build a house on said lot mentioned in complainants petition, and said Company denies that there is anything due said complainants for materials furnished and work done in erecting a house on said lot mentioned in the petition, the said Company therefore asks that said petition may be dismissed and said Company may be allowed its reasonable costs and charges in this behalf most wrongfully sustained

W. A. Green Sol for Deft

Endorsement: Holmes v. McKevin

John Donaldson et al

Answer of the Emporium
Real Estate and Manufacturing
Company

Filed 22 day of April
A D 1859

And at this day, on Saturday of the term, it being the 12th day thereof and the 24 day of the month April A.D. 1859 the following decree of said court was pronounced and made a matter of record therein, viz

James Holmes
Asher L Wilkinson
vs
John Donaldson for
Emporium Real Estate
Manufacturing Company

Ret for Mich'l Law

And now at this day again came the plaintiffs, thereupon came the Emporium Real Estate & Manufg. and their answer being on file and the defendants Donaldson having been duly notified of the pendency of this cause, at the three times solemnly called came not but made default, and thereupon the cause was heard before the court on petition answer & proofs, and on the hearing thereof the court decree, that Donaldson or the Defendants, pay the plaintiffs the sum of seven hundred and twenty five dollars within

[8638-b]

60 days and an failure to do so that all the estate, rights, title, claim, interest and demand of whatsoever nature or kind of the said defendants of in and to Lot Number 39, in Block Number 4 Range 1 in Emporium plat of Mound City in the County of Pulaski and State of Illinois together with the frame building two stories high 25 feet long by twenty two feet wide thereon situated, be sold to satisfy said amount & costs of this suit and the balance if any to be paid to the Company that James McDonough be and he is hereby appointed commissioner to sell the same that said sale be made in manner & with like notice as in cases of sheriffs sales under execution, at Common Law and that commissioner report to next term. Whereupon the defendants C. & O. & Green their attorneys except and they are allowed 30 days to file bill of exceptions

And thereafterwards, to wit, at the Rules held in the office of the Clerk of said circuit court on the 23rd day of May A.D. 1859 came the defendants the Emporium Real Estate and Manufacturing Company and filed their bill of exceptions which said bill of exceptions and the endorsements thereon are in the words and figures following, to

James Holmes &
Niles L. Wickwire
vs
John Donaldson

In Pulaski County
Circuit Court - April
Term A.D. 1859.
Petition for Mechanic's
Lien.

Be it remembered that when this
case came up for trial, at the April term
of the Pulaski County Circuit Court - that
by consent of the parties the matters of both
law and fact were submitted to the Court.
This is a case of a Petition for mechanic's
Lien, filed by James Holmes, ~~and~~ & Niles
L. Wickwire against John Donaldson, and
praying that the Emporium Real Estate
and Manufacturing Company should
be made a party defendant. Said Company
came in and answered. - The said plaintiff,
to maintain the issue on their part,
gave the following testimony
to wit -

An article of agreement, entered into betw
"en John Donaldson of the first part and
Holmes and Wickwire, partners, of the
second part. Said agreement was
entered on or about the Twenty seventh
(27) day of April A.D. 1857, and was
as follows -

Donaldson agreed to pay Holmes
and Wickwire One thousand ($1000)
for furnishing materials, and
erecting a frame house of certain dimensions and lot

[9538-7]

number thirty nine (39) in Block number four (4), Ramp One (1) East in Nauvoo City, County of Hancock and State of Illinois, in accordance with the plat and survey, and accumulations and increase as appears, Lucie Donaldson paid twenty five (25) dollars in hand to Holmes and Wilkerson, and agreed to pay the remainder (50) dollars in sixty (60) months from the date of said Contract, and the balance of the one thousand on the completion of said house. Said Contract was duly signed by the parties — John Donaldson, Holmes & Wilkerson —

Said plaintiffs introduced Edward H. White as a witness, who testified as follows — That he was a copentu by trade and resided in Nauvoo City — That said Holmes and Wilkerson had put up the frame of said house for said Donaldson — and inclosed the same, and partitioned the floors of said house and finished the staircase for the frame work of said house, and for nailing the same and also for laying the floors, and also for doing many things etc that had been done towards raising and finishing said house.

Said witness further testified

said to him Harris & McKown had attempted to persuade said Hunn - that Donelson told him, the witness. that he (Donelson) was not able to go on and finish said house. and wanted him - the witness to take said house and finish it - and give him the same price the contract was to pay him for himself, and for the workmen necessary to finish said house, said witness further testified that Harris & McKown got him to make an estimate of what the work then had done, and the materials then had furnished, was worth - said witness testified that it would have taken, or did take two hundred and fifty (250) dollars to have finished said house according to the specification agreed upon by Donelson and Harris & McKown and that he work done by the plaintiffs and the materials furnished by them was worth seven hundred and fifty dollars. ($750.)

The plaintiffs also introduced Hartzell Hunn as a witness who testified as follows. —

That he - Hartzell Hunn, at the request of John Donelson, went

up an article of agreement between said Donelson and Hulsey & Nickerson for the building of said house — that said Hulsey & Nickerson had furnished the material and erected a house for us according to said agreement. This is substantially all the testimony offered against plaintiff.

The Commonwealth Realestate and Manufacturing Company appellees offered the following testimony —

First — A title bond or article of agreement between said ~~Donelson and~~ said Company and said John Donelson Sr. for the sale of Lots his Undivided one fourth (39 + 40) in Block No. four (4) Range one (1) East in Nauvoo City County of Hancock and State of Illinois — which is in the words and figures following.

"This Witnesses that John Donelson Sr. has this 17th day of April, 1857 purchased of the Commonwealth Real Estate & Manufacturing Co. Two (2) lots of ground — Lots 39 + 40 in Block No. 4 Range No. 1 East in Nauvoo City County of Hancock State of Illinois, in accordance with the terms of their petition of said town and appurtenances and received according to law as "Exposition", has executed his three several notes to the said

company for the purchase money, bearing interest at the rate of 4½ per cent. per annum, as follows:

No. 1. Date April 17th. 1857. at 1 year for $522.66
No 2 " " " " " 2 years " $522.67
No 3 " " " " " 3 do $522.67.

The consideration of the above obligation are as follows:

That the Ecclesiastical Real Estate and Manufacturing Company hereby covenants and agrees with the said John Dunlevy, his heirs or assigns, that they will execute or cause to be made a warranty deed in fee simple for the tracts or pieces of land above mentioned so soon as the purchase money shall have been paid in accordance with the conditions and terms of sale. And it is further understood that if the said John Dunlevy shall fail or refuse to pay any of the instalments as aforesaid as they become due, the said company may at the expiration of thirty days thereafter, by order of their Board declare the purchase and sale aforesaid void without the intervention of any deed or decree of any Court. And this obligation shall forever thereafter cease and be void.

[8538-9]

and the same shall extinguish may be sold and conveyed for and clear of all encumbrances, claims or demands such share but in the mine. Witness the seal of Exposition Real Estate and Manufacturing Company hereunto affixed by virtue of the authority granted to the undersigned President and attested by the Secretary thereof the day and year aforesaid.

S. A. Fairin - President

Attest J. Goswell, Secretary.

Lots 39 & 40. Block 4 Range 1 East Lot 56. Page 25.

Patent 1868.

Quite back of said Lots Bond there was a condition written in the words and figures following.

The terms of the mission certificate on such and claimed Donaldson appertaining to the said A. R. & M. Co. that he will cast a claim for said certificate within twenty days this date, a good sufficient frame house on said the said lots, and to complete the same in a neat and workmanlike manner.

John Donaldson Jr.

Mount Ida M. Apr. 17th 1857.

The following is a copy of
the notes mentioned in
the above instrument and
all in the words and figures
following, to wit,

No. 1) $5-22 64/100 } Empirium Rutledge County Ill.
April 17th 1857.

On demand I promise
to pay to order of the Empirium
Rail Road and Manufacturing
Company Five hundred and
twenty two 64/100 dollars, at the
office of the Company with
interest at the rate of six
cent. per annum, value received.

John Donaldson
Commercial Agt.

No. 2 } $5-22 67/100 } Empirium, Rutledge Co Ill
April 17th 1857

For value received I promise
to pay to the order of the Empirium
Rail Road and Manufacturing
Company five hundred and
twenty two 67/100 dollars at the
office of the Company within
"one at the rate of six per cent. per ann.
"um. value received.

John Donaldson.

No 3 } Empirium Rutledge Co Ill
April 17th 1857

Three years after date I promise
to pay to the order of the Empirium

Real Estate and Manufacturing Company for manure and bones and ~~for~~ acres at the office of the company with interest at the rate of six per annum until sworn.

John Donaldson.

Said Company then introduced Jeremiah Hunn as a witness who testified as follows. That he was President of the Empire Real Estate and Manufacturing Company at the time said Donaldson purchased said lots No. 39 & 40, mentioned in the above instrument — that the first payment on said lots was tendered and given on the condition that the said Donaldson would erect a fence from off certain dimensions upon one of said lots — that the consideration to erect said fence on lot 39, and complete it was as much as upon a principle or stated. That Said Donaldson had never paid a single cent on said lots and that he had made bitter complaints to witness of the condition of said lots, and that he had for fifteen or eighteen months to said lots. Said Hunn further testified that no proceedings of the Donaldson had passed said

lots purchased Company
that he (Donelson) had required
him (Heim) to make up the
bill minus a account
between him Donelson and
Adams & Wickersham for the
furnishing materials and
building said house, and that
he accepted a account same
as a matter accommodation
to said Donelson, and that said
Company paid no
part to said account for
building said house between
said Donelson and Adams
& Wickersham, was not correct
nor, in any manner at all,
nor had it any thing whatever
to do with the sale of said lots
made by said Company. to said J. M. Donelson,
Said Company
also introduced James Martin
as a witness who testified as
follows, - That he was the
Secretary of said Company that
Entered & Manufacturing Company.
That Donelson had no business
dealing on the notes given by said Don-
elson to said Company Co. for
said lots - That said Donelson
had purchased all claims to said
lots.

The above is not the testimony

instrument by the said Empire Real Estate and Manufacturing Company.

After all the accumulations was introduced, and the above facts made known to the Court, the Court caused a judgment in favor of Hutson & Dickson for the sum of Lien mechanic and Materials for laborers, and that the sum should be paid in 10 days by the said from Donaldson & the Empire Real Estate and Manufacturing Company, and if not paid within that time, by the sale of the other of said parties, that said property should be sold, and that said judgment in favor of said Hutson and Dickson, be first paid out of the proceeds of said sale, and the surplus be paid to the Empire Real Estate and Manufacturing Company.

Whereup-- the said Empire Real Estate & Manufacturing Company said is bill of exceptions to the decisions of the said Court, and the counsel of the Empire Real Estate and Manufacturing Company moved this the said Court said as it (his) Honor and not to this bill of exceptions

which is auditing in
Wesley Sloan (Cont'd)

Endorsements on the Same

Holmes and Nikirk
vs
John Donaldson

Bill of Exceptions

Filed 23 May 1859
J.M. Dawes
clerk

State of Illinois } ss
Pulaski County } I Jas M Dawes
Clerk of the circuit court in and for
the said county do hereby certify that
the foregoing pages contain a true
and correct transcript from the files
and records of my office of the Pleadings,
Summons with the endorsement and return
thereon, affidavit and the endorsement
thereon, notice and publishers certificate
thereto subpoenas, orders of the court,
answer of defendants with endorsement
thereon, decree, and Bill of Exceptions
with the endorsement thereon in the
foregoing cause styled James
Holmes and Stella Nikirk vs John
Donaldson and Empirium Reducer
and Manufacturing "Mechanics Lien"

[8538-18]

as fully wholly and completely as the same remains in said circuit clerks office

In testimony whereof I hereto subscribe my name and affix the seal of said circuit court at office in Scottsville Ky this 9th day of June A.D. 1859

Jas M Davidge
C.C.K

Plaintiffs Bill of costs

Docketing 10c Cert appeal 15	25
Filg Bill 50c Summons filg 40c	45
Aff 10c notice to publisher 50c Order 20	80
Sub filg 40c Decree 40	80
Sol 15 Bill 50c Filg & makes 10	75
Copy decree 40c certificate 35c	45
Copy bill 25c Serving subpn 15c	40
	$4.00
Wednesday & Saturday 4 days	4.00
Sheriff fees Serv summons & postd	1.25
" " Serv sub subpoenas	2.70
Clerks fee	1.25
	$13.20

A copy attest
Jas M Davidge Clerk

Defendants Bill of Costs

Dus apparitg 10c	Bill & answer 5c	20
Subpoenas 10c		10
Examinpt 50 folios a 10		5 00
Certificate & seal 35c	Bill 50c Apptg 25	90
Postage & mileage		21
		$6.41

A copy attest
Jason Shedd Clerk

[8538-13]

Pulaski Circuit Court

Transcript of Record

Holmes & McKwin

vs

John Donaldson &
Pinpernuckle
Dealers & Manufacturers
of Company

Petition for Mechanic Lien

Max Winston
Clerk of Superior
Court.

[1530-17]

John Donaldson &
Emporium Real Estate &
Manufacturing Company
vs
James Holmes &
Niles L. Wickwire

Pltffs
In Error.

Defendants
In Error.

And the said Emporium Real Estate and Manufacturing Company now comes and says, that in the Decree and Proceedings aforesaid, there is manifest Error in this — to wit —

1. The Circuit Court erred in the opinion that John Donaldson had such an interest in said lot as was subject to a Mechanics Lien, at the time said Holmes and Wickwire contracted with said Donaldson to furnish materials and erect said house.

2. The Circuit Court erred in the opinion, that John Donaldson had not absolutely forfeited all interest, of whatever

[8538-15]

hines, he need in said let-
before Holmes and Wickwire
filed their petition for
said Mechanics Lien.
3. The Circuit Court erred in
the opinion that John
Donaldson was the agent
of the said Emporium Real
Estate and Manufacturing
Company, and that said
Company were responsible
to Holmes and Wickwire,
as original Contractor, for
the furnishing materials
and erecting said house
4. The Circuit Court erred in
rendering a Decree in favor
of said Holmes and Wickwire,
when, by the laws of the State,
it should have been given
in favor of said Emporium
Real Estate and Manufacturing
Company; wherefore the said
Emporium Real Estate and
Manufacturing Company
prays that a Citation and
Supersedeas may issue,
and that the said Decree

[8539-16]

may be reversed, annulled and held for nothing; and that the said Emporium Real Estate and Manufacturing Company may be restored to all things which it has lost by reason thereof.

J. A. Green
Atty. for Appellants.

Donaldson & Emporium Company
vs } Precipe } Circuit Court
Holmes and Wickwire } of Pulaski County

{ Decree for Mechanics Lien, At the April term of Pulaski County Circuit Court A.D. 1859.

Issue a writ of Error to the Circuit Court of Pulaski County, State of Illinois, against James Holmes and Niles E. Wickwire, returnable at the proper time for the next term of Supreme Court; Also issue notice and Citation to Defendants in Error. Also issue Supersedeas. J. A. Green
Atty for Pltff. in Error

To Clerk of the Supreme Court.

[8038-17]

No 22

John Donaldson &
Emporium Real
Estate Manufacturing
Company
Pltffs in Error

vs

James Holmes and
Niles L. McKwire
Defts in Error

Error to Pulaski

Filed July 6. 1859 —
A. Johnston Clk

Prepaid — $5.00

Assignment of
Errors.

Now comes the plaintiffs in error and
assigns the following errors
upon the record and proceedings
in this cause — to wit — the Circuit court
of the Eighth Judicial Circuit
of the State of Illinois — on
Tuesday the 7th day of June
A.D. 1859 — to wit — the Circuit court
of said Eighth Judicial Circuit
in said State of Illinois — on
said day — to wit — the
following errors — to wit —

Errors assigned & filed July 6 A.D. 1859
Chas. Blanc Clerk pro tem. Circuit Ct.

Abstract of Plaintiff in Error & Argu.

JOHN DONALDSON and EMPORIUM COMPANY	Plaintiffs in Error.
vs.	
JAMES HOLMES and NILES L. WICKWIRE,	Defendants in Error.

This was a petition for a Mechanic's Lien, filed by Holmes & Wickwire, at the April term of the Pulaski Circuit Court, 1859, against John Donaldson, and praying that the Emporium Company might also be made a party defendant to said petition.

Pa. 13-14-15-

The plaintiffs proved that Donaldson entered into a written agreement with them, on or about the 27th of April, 1857, by which he was to pay them $1,000 for furnishing materials and erecting a frame house, of certain dimensions, on a certain lot of ground in Mound City; $25 was to be paid down, which was done, and $500 in six months and the balance on completion of the work. They proved that they commenced the job, and furnished materials and performed work to the amount of seven hundred and fifty dollars and that they were prevented from completing the job by Donaldsons not being able to comply with his part of the contract. Default was taken as to Donaldson; but the Emporium Company filed an answer, setting up amongst other things, that the lot on which said house was partially constructed, belonged to said Company; and

16

proved that on the 17th day of April 1857, John Donaldson purchased lots, 39 & 40, in the Emporium plat of Mound City from said Company; that the Emporium Company executed to Donaldson a certificate of sale of said lots on the following conditions to wit: Donaldson was to pay said Company $1568 for

17

the two lots, and executed his three several promising notes for the same; one for $522.66 payable in one year from date; one for $522.67 payable in two years and one for the same amount as the last payable in three years. If Donaldson failed to pay either of said notes as they became due the Emporium Company reserved the right to absolutely rescind the contract by order of its Board of Directors, at the expiration of ninty days after such failure on the part of Don-

20-1

aldson. Donaldson failed to make the first payment, and the Emporium Company rescinded the contract according to the conditions of the certificate of sale.

There was a condition written on the back of said certificate of sale, requiring Donaldson to construct a frame house of certain dimensions, on one of said lots within one year from the date of the sale; the house partially executed by Holmes and Wickmire was on No. 39 of the above mentioned lots.

Hartzel Heiner was President of the Emporium Company, at the time Donaldson purchashed said lots and knew all about the conditions of the sales between the Emporium Company, and Donaldson for the lots; and he, also, at the request of Donaldson, and as a mere matter of accomodation to the parties drew up the agreement between Holmes and Wickmire and Donaldson for the furnishing materials and building said house, but he testifies that said sales were in

21

nowise connected with each other. It was one year and ninty days from the time Donaldson purchased the lots until he forfeited his certificate of sale and the lots reverted back to the Emporium Company. Holmes and Wickmire furnished the material and partially erected the house immediately after Donaldson purchased the lots; but did not attempt to enforce their Lien until after Donaldson had absolutely forfeited all his right, and the lot had reverted back to the Emporium Company.

The Court decreed that Donaldson, or the Emporium Company should pay Holmes and Wickmire the sum of seven hundred and twenty-five ($725) dollars, in sixty days, and if not paid within that time, that the property should be sold and Holmes and Wickmire be first paid out of the proceeds of such sale, and the overplus be paid to the Emporium Company.

The following errors are assigned.

1st. The court erred in decreeing that Donaldson or the Emporium Company should pay Holmes and Wickmire seven hundred and twenty-five dollars, or the property be sold and Holmes and Wickmire be paid first out of the proceeds of such sale.

2d. The court erred in the opinion that Donaldson ever had such an interest in said lot as was subject to a Mechanic's Lien; and, also, in the opinion that if he ever had such an interest, that it was not absolutely determined before Holmes and Wickmire attempted to enforce their Lien.

3d. The court erred in the opinion that Donaldson was the agent of the Emporium Company, and that said Company was responsible to Holmes and Wickwire on the contract entered into between Holmes and Wickwire and Donaldson for furnishing materials and building said house.

Authorities refered to:—Pruple's Statutes of Illinois, Chap. LXV. Part 11. Page 726. Secs. XVII & XX.

Calvin Steigleman, et. al. vs. A. McBride, 17 Illinois Page 300.-1—2.

T. A. GREEN, Attorney for Plaintiff in Error.

John Donaldson & Empornim Co.
vs
Johns & Wickline

First Grand Division of the Supreme Court of Illinois. No. Term A.D. 1859.

The annexed Abstract contains a full and correct statement of the facts in the case.

1st. Donaldson could not have been the agent of the Empornim Co. because he purchased the lots from said Company and the Co. gave him free possession, and he had the absolute control of the same until he failed to comply with the conditions of the Certificate of Sale or title bond; and was during that time that he entered into a contract with Johns and Wickline to furnish materials and erect said house. Hartzer Hanner who was at that time President of the Empornim Co. drew up the agreement between Donaldson and Johns and Wickline for the furnishing materials and

[8500-17]

building the house, but he testifies that he did so at the request of Donaldson and doing as a matter of accommodation to him; and that the contract between the Empire Co. and Donaldson for the sale of the lots, and that the contract between Donaldson and Johns and McKinzie (Mechanics) for building the house had nothing at all to do with each other. Donaldson purchased the lot from the Co. and employed Johns and McKinzie to build him a house, and he afterwards forfeited what interest he had in the lot by not complying with the conditions of the sale. He had one year and 90 days in which to make the first payment, but failed to make it or any part thereof. He never paid the Co. one cent of the purchase money. The court below decided the case on the ground that Donaldson was the agent of the Co. and that the Co. was responsible to Johns & McKinzie on the contract between Donaldson and Johns and

Mckinne for building the house; because the President of the Empire Co. simply had knowledge of the fact that Hilins and Mckinne were building the house on one of the lots that Donaldson purchased from the Co. All the testimony is embodied in a Bill of Exceptions, and the Court will see by reference to the record - I think, Pa 21 - that Donaldson was not in any view of the matter, the agent of the Empire Co.

2d " I admit that all the interest of whatever kind or nature Donaldson had in the lot on which the house was erected was subject to a Mechanics Lien; but the extent of the Lien is limited to the interest that Donaldson had in the lot of ground on which the house was erected; and cannot extend beyond, so as to infring upon, or in any wise chance the Dolinn contract entered into, some time previous, between the Empire Co. and Donaldson. Donaldson absolutely forfeited all

Hilins & Mckinne and Donaldson at the time the contract was entered into between

[8538-51]

the interest he had in the lot in one year and 90 days from the time he purchased it; and it was not until after he had absolutely forfeited all the interest ~~in the~~ he ever had in the lot that Holmes and Mackaine attempted to enforce their Lien; and as their Lien must be limited to whatever interest Donaldson had in the lot, and as all the interest Donaldson had in the lot had absolutely determined before they attempted to enforced their Lien, their Lien is good for nothing — Their Lien it seems, to me cannot interfere with the rights of the Company &c.

A Mechanics Lien extends to all the interest, which the one who employs a mechanic to furnish material and bestow labor towards erecting buildings and appurtenances thereto, has in the land or lot on which such building is erected; and no farther; because if it goes beyond it infringes on the rights of third persons.

This question has not yet been decided by the Supreme Court of this State

at the time the Mechanic furnishes and bestows labor

The Supreme Court of this State have decided that the vendor of Real Estate, where an absolute conveyance is made, and no mortgage or other security is taken, that the vendor has a Lien on the property for the purchase money as to the vendee and all subsequent purchasers with notice that the vendor has a lien on the land for purchase money. See argn. Dyer vers. Martin et al. 4 Scam. 151.

Now can a Mechanic's Lien be extended so as to interfere with the rights of vendors of real estate? I think not.

8d. The last point I shall direct the attention of the court to, is this: That Holmes & Arickine can only succeed to (any) whatever the building erected or partially erected by them has increased the property in value, and if the courts can go so far ~~as~~ as to sell the property of the Emporium Co. without ~~their~~ its consent, the Co. any thing has a prior Lien on the property for the purchase

[8538-22]

money which should be paid before the Mechanics Lien of Hollins & McKinne, but it seems to me that it would be a gross outrage on the rights of the Company Co to even have the lot subjected to sale, and the purchase money be first paid to the Co. and the overplus to Hollins & McKinne. I think it would be a violation of the rights of the Company Co. because the lot absolutely belongs to the ~~Co. Company Co.~~ said Co. and it was Hollins and McKinnis misfortune to contract to furnish materials and build a house for Snoddons on a lot ~~to~~ in which he had but a conditional interest, as their lien could only ~~succeed~~ attach to his uncertain interest.

This argument is hasty and imperfect, but the context may be evoked from the record & abstract to understand all the points in the case — In fact I hardly deemed it worth while to write out an argument at all.

J. A. Green
Atty for Plaintiffs in Error

No. 77.=18

Donaldson et. al.
vs
Helms & Wickersham

Argument
of
Plaintiffs Counsel

[1858-23]

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

HOLMES & WICKWIRE, Defendants in Error. vs. EMPORIUM REAL ESTATE AND MANUFACTURING COMPANY, Plaintiff's in Error.	Error to Pulaski.

DEFENDANTS BRIEF OF POINTS AND AUTHORITIES.

1st. There is no abstract of the Record filed by the Plaintiff.

2nd. The bill of exceptions is without date and does not show that the exceptions were taken at the time the decision was made or that it was signed at the trial.

III Scam. 21, 63, IV Gilman 448, XI Ills, 72, 84
V Gilman 456, XIII Ills. 666, 700, XVII Ills. 238

3rd. The article of agreement between Holmes & Wickwire and John Donaldson, which appears as by the Record was in writing and offered in evidence at the trial, is not embodied in the bill of exceptions.

XIII Ills. 572, XII Ills. 379, III Scam. 185
II Gilman 727-8, III Gilman 366-7 IV Scam. 419.
II Scam. 506-7.

4th. The bill of exceptions shows that the Emporium Real Estate and Manufacturing Company by the testimony of H. Hainer, then President of said Company, stood by and saw the building erected by Holmes & Wickwire upon the lot in question.

Statute, page 159, Sec. 22. XIV Ills. 269, Sec. 23.

WM. HUNTER, *Attorney for Defendants in Error.*

[8538-24]

State of Illinois
Supreme Court
First Grand Division
November Term 1859

Holmes & Wickwire
Defendants in Error

vs

Empire Real Estate
& Manufacturing Company
Plaintiffs in Error

Defendants Brief

22

Filed Nov. 24. 1859.
N. Johnston Clk

State of Illinois, Supreme Court
1st Grand Division Nov Term 1859

John Donaldson &
Europoum Real Estate
& Manufacturing Company
Plaintiffs in Error
vs
Holmes & McKewin
Defendants in Error

And the said Defendants come and says there is no error in the Record of this case and this they pray may be engrossed by the Court

Wm McHenry atty for
Defendants in Error

John Donaldson
& Ern R E & M Co
vs
Holmes & Nickum

Joinder in Error

22

Filed Nov. 24. 1859.
N. Johnston Clk

State of Illinois Supreme Court
First Grand Division November Term 1859

John Carraden and
Emporium Real Estate and
Manufacturing Company
Plaintiffs in ~~Appeal~~ error
vs
Holmes & Wickwire
Defendants in appeal

} Error to ~~Appeal from~~ Pulaski

The Said parties by their respective attornies move the Court to open the order of Continuance made in this Cause to day and ask that an order may be entered, that written arguments may be Submitted and filed within twenty days from this date and the Cause decided in vacation

November 18th 1859

Wm Hunter atty for
Holmes & Wickwire
W. A. Allen
Attorney for
Em. R E & M Co

[5538-01]

22

John Donaldson & Company
vs
Atkins & Wickin

Agreement to file written arguments and have the case determined in vacation

Filed Nov. 18. 1859.
A. Johnston Clk

State of Illinois in the Supreme Court
First Grand Division November Term 1859

James Holmes & Niles L Wickersen
Defendants in Error } Error to Pulaski
ads
John Donaldson and the
Emporium Real Estate and } Motion to
Manufacturing Company } Dismiss
Plaintiffs in Error

The Said Defendants Come and move the Court to dismiss this Cause for the following reasons

First The has been no abstract of the Record filed within the Rule to wit, twenty days after Supersedeas, that on file was not filed until the third day of this Term, Rule XXI

Second – The Bill of exceptions do not Show that the exceptions were taken at the time the decision was made or that it was signed at the trial, or that time was given to file Bill or the date of Signing by the Court below, nor does the abstract Supply these defects in any particular

[8538-a]

IV Gilman 448 XI Ills 72, 84. III Scamman 21, 65
V " 456 XIII " 666-700 XVII Ills 238.

Third The article of agreement between Holmes & Hickwire and Donaldson & which appears by the Record was in writing and offered in Evidence at the the trial of the Cause, is not embodied in the Bill of exceptions,

XIII	Ills	572	II	Scam.	506-7
XII	"	379	III	"	185
II	Gilman	727-8	IV	"	419
III	"	366-7			

Wm Hamilton atty for
Defendants in Error

[P538-28]

22

Holmes & Wickwire
ads
John Donaldson &
Em R C & M, Co

Motion to dismiss

No 22

Filed Nov. 19. 1859
A. Johnston Clk

Mound City June 28th 1859

Maj. Johnston,

Sir: Accompanying please find Supersedeas bond in case of Holmes & Wickwire vs. John Carlson & Empire Co. Company. You will please issue a Supersedeas instanter if you can do so without undersheriff out of the judges. The property will be sold in a short time and it is important to appellants that the sale should be stopped as the defendants in error are not responsible. I sent you a full copy of the record in the case with other necessary papers, by Mrs. Ch. Casy of this place who started for your town a day or two ago. Gen. M. M. Rawlings is dead and I presume you are aware that he is one of the wealthiest men in Southern Illinois. This is an important case to the Empire Co. as they have a number of other cases of the same kind and involving the same principles, and this and of course will determine them all, so I trust you will pardon me for so urgently asking you to attend to issuing the Supersedeas in the matter

[8528-29]

Please send the writs to me and I will hand them to the Sheriff.

Yours truly
J. A. Green

Mound City Aug 14th 59

Maj. Johnston,

Dear Sir: Yours of your 30th was duly received — I sent you a bond a day or two ago, and I presume I need not give you any [illegible] references as to Gen. Grant's responsibility as I suppose you are acquainted with his circumstances. Enclosed please find six dollars, which I presume will be sufficient to pay the present. Please attend promptly to the matter and send me a Spencer's just as soon as possible.

With much respect I have the honor to remain

Very truly yours
Wm. A. Green

[8538-30]

2 2

The £1 - for expenses - sending Parcel to Carlyle -

Know all men by these presents; that we the Emporium Real Estate and Manufacturing Company and Moses M. Rawling, are held and firmly bound unto James Holmes and Niles L. Wickwire, in the penal sum of fifteen hundred dollars, lawful money of the United States, for the payment of which we bind ourselves our heirs, executors and administrators, jointly severally and firmly by these presents.

Witness our hands and seals this 28th day of June A.D. 1839.

The condition of the above obligation is such, that, whereas, the Emporium Real Estate and Manufacturing Company has sued out a writ of Error from the Supreme Court of the State of Illinois, upon a certain decree, rendered in the Circuit Court of Pulaski County and State aforesaid, at the

[8538-31]

April term thereof, A.D 1859, in favor of James Holmes and Niles L. Wickwire, on a petition for Mechanics Lien, for the sum of seven hundred and twenty five dollars, & Costs of suit; against the John Donaldson Jr, and the said Emporium Real Estate and Manufacturing Company; and, whereas, the said Emporium Real Estate and Manufacturing Company, has obtained the allowance of a Supersedeas, to stay further proceedings, in said Case.

$13.20

Now if the said Emporium Real Estate and Manufacturing Company shall duly prosecute their writ of Error, without delay, and shall pay the amount of said Decree and Costs, Interest and damages, in case the said Decree of the Circuit Court shall be affirmed, in whole, or in part, or shall pay whatever Decree the Supreme Court may render against said Company, with Interest, Damages

(8558-32)

022

Holme

vs

Emporium Company

Supersedeas Bond

John Donaldson and
Emporium Real Estate
Manufacturing Company
Pltffs in Error

vs { Supersedeas
bond —

James Holmes and
Niles L. Mikeire
Defts in Error

Filed July 6. 1859 —
A. Johnston Clk

and costs, then this obligation
shall be void; otherwise to
remain in full force
power & effect.

Witness our hands & seals
W. W. McCartney (Recd)
Wolcott, S. Freeman (Recd)
Recd Copy

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Pulaski County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Pulaski county, before the Judge thereof between James Holmes and Niles L. Nickerson

plaintiffs and John Donaldson and Emporium Real Estate Manufacturing Company

defendants it is said that manifest error hath intervened to the injury of said John Donaldson & Emporium Real Estate Manufacturing Company as we are informed by their 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 Mount Vernon, 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 James Holmes and Niles L. Nickerson

that they be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at **Mount Vernon,** in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if they shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said James Holmes & Niles L. Nickerson notice together with this writ.

WITNESS, the Hon. John D. Caton Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this Sixth day of July in the year of our Lord one thousand eight hundred and fifty nine.

Noah Johnston
Clerk of the Supreme Court.

[8538-33]

22

SUPREME COURT.

First Grand Division.

John Donaldson & Emporium Real Estate Manufacturing Company

Plaintiffs in Error,

vs.

James Holmes and Niles L. McIlvoir

Defendants in Error.

~~James Holmes~~

SCIRE FACIAS.

FILED.

I hereby certify the within to be a true copy of the writ issued in said cause.

Niles L McIlvoir Defendant

July 15th 1889 A. D. Bartlett Sheriff

Sheriff's Fees Pulaski County Illinois

Service & Ret 1 Mileage 2 Mile 1.00. $2.10

The writ of error which has been filed in this cause is made a supersedeas, bond by the plaintiffs in error, and approved by the undersigned.

Frank Scholfield Clk

State of Illinois,
CLERKS OFFICE OF THE SUPREME COURT, } SS
First Grand Division.

I hereby certify that a writ of error hath ifued from this Office for the reversal of a Judgment obtained by James Holmes and Niles L. McKwin *Against* John Donaldson & Emporium Real Estate Manufacturing Company *in the Circuit Court of* Perastki *County at the* April *Term, in the year of our Lord one thousand eight hundred and* fifty nine *in a certain action of* Petition for Mechanics Lien ~~for~~ *which writ of error is to operate as a Supersedeas, and as such is to be obeyed by all concerned.*

Given *under my hand, and the seal of the said Supreme Court, at* MOUNT VERNON, *this* Sixth *day of* July *in the year of our Lord one thousand eight hundred and* fifty nine

Noah Johnston
Clerk of the Supreme Court.

[8538-34]

22

SUPREME COURT.

First Grand Division.

John Donaldson and
Emporium Real Estate
Manufacturing
Company
vs
James Holmes and
Niles L. Mitchell

WRIT OF SUPERSEDEAS.

FILED.

Admit the within and
Same to Paul Vaughn Chairman Exec of
Plaintiff Counsel Dated Chicago Sept 21 96
Complain in the within entitled cause
James Holmes & Niles L. Mitchell Defendants
in the Circuit Court of Cook Co
State of Illinois
Paul Vaughn Chairman Exec Plaintiff 16 a
Portion
Sept 21 96
A C Paulson Clerk
Paul Vaughn Chairman

Supreme Court State of Illinois
Mount Vernon November Term 1859

Holmes & Weckwine
Defendants in Error
ads
John Donaldson &
Emporium Real Estate &
Manufacturing Company
Plaintiffs in Error

To be heard upon written argument in vacation

Argument of Defendants

1st There is no abstract of the Record filed by the Plaintiff.
The Supersedeas was issued in September no abstract was filed by Plaintiff at any time before November Term, but on the third day of the term the abstracts were placed among the papers of the case without any file mark.
2d The Bill of exceptions is without date and does not show that the exceptions were taken at the time the decision was made or that it was signed at the trial, and it does not appear either upon the Bill or abstract that any time was given by the Court below for the filing of the Bill of exceptions,

[8538-35]

3" The article of agreement between Holmes & Wickwire and Donaldson which appears by the Record was in writing and offered in evidence at the trial of the Cause is not embodied in the Bill of exceptions

4" The bill of exceptions shows that the testimony of H Hamer that the Emporium Company stood by and saw the building erected by Holmes & Wickwire upon the lot in question,

In regard to the third point in the case of Mears vs Flint in XIII Ills. 572 it is held that in order to bring the evidence offered at the trial before this Court it must be embodied in the Bill of exceptions; the same principal is recognized in Meagher vs Hume et al XII Ills 379. and in the Case of McLaughlin vs Walsh III Scam 185 it was held substantially that "the Bill of exceptions must contain Copies of any or all written instruments, that were exhibited in evidence at the trial"
In Hatch vs Potter II Gilman 727 the same rule is more distinctly noticed, it is there decided that to entitle papers used upon the trial in the Circuit Court

to notice in this Court they must be copied into or specially refered to by the Bill of exceptions, also in Cooney vs Russell 111 Gilman the same point is held, There is no evidence whatever before this Court nor is it Claimed that the original paper refered to has been lost or that it cannot be produced, and Defendants do Claim that the attempted Synopsis of its Contents in the Bill of exceptions, is in some of the most important particulars most palpably untrue and calculated to deceive the Court will observe that there is no excuse whatever offered for its non production

On the fourth point Hamer testifies in his evidence adduced by the Defendant below, "that he was President of the Emporium Company at the time, Donaldson purchased the lots, 39 & 40, that the payment on the lots was extended by the Company one year on Condition that Donaldson would erect a frame house of certain dimensions upon one of the lots, that he commenced to erect said house on lot 39 and completed it so far stated, that Donaldson had never paid a single dollar on the said lots, and that he had not complied with any of the conditions

(2538-36)

of said Sale that he had forfeited all claims
&c that a few days after Donaldson
had purchased the lots, he requested him
(Hamer) to draw the before mentioned —
agreement between Donaldson & Holmes &
and Wickwire, and that Hamer drew
said agreement, that the Emporium Co,
were not a party to the said agreement,
&c

On the first page of the Bill of exceptions
it is stated that "The said Plaintiffs to
maintain the issue on their part, gave
the following testimony To Wit,"
The Court will observe that it is represented
here that the Plaintiffs testified, of course
it is a case in which the Plaintiffs could
not testify and is simply a blunder of
Counsell in drawing the Bill of exceptions
and an Error of the Court in signing it,
The truth is that this was the testimony
of Hamer in Connection with the article
of agreement which as is there shown was
was produced in evidence which article
of agreement was never signed by Donaldson
& which the production of the original
instrument will show,
In the Certificate of purchase issued by the
Em Co to Donaldson there are conditions

The first, that if Donaldson failed to pay any of the instalments as they became, the Company in ninety days thereafter by a resolution of their board of Directors rescind said sale without any order of Court, and the Certificate to be void

On the back of the Title Bond or Certificate was another Condition that Donaldson should erect within twelve months from date a frame house of certain dimensions on one of said lots,

It does not appear in testimony that Holmes & Weckwire ever had any notice of the nature or terms of this Contract between Donaldson and the Company, and as the Certificate was not recorded even constructive notice cannot be infered, the Record title was and still in the Company and the only assurance that Holmes & Weckwire could have that Donaldson was the owner of the premises was from Hamer the President and the fact that Hamer acted as the Scrivener for parties is conclusive as to fact of notice to the Emporium Company, the evidence then showed that the Com'y had perfect knowledge of the Contract and progress of the building

Further by the Conditions of the Certificate of purchase Donaldson was required

[8538-39]

to erect this building and before he was to possess any title it was required to be completed, that at any time after the completion of the building if Donaldson should fail to pay any one of the instalments, the property should revert to the Company and with it the improvements erected by Holmes & Nickerson, with full notice to the Company of the nature and extent of their claim, but no notice to them of the existence of the claim of the Company Holmes & Nickerson get nothing for their labor, — while the Company take back the property and make a clear profit of the improvements

In the case of Higgins & Mealany vs Ferguson et al XIV Ills 269 this Court held "That where the owner of land stands by and suffers credit to be given to another, on the supposition that he owns the land and aids in creating the belief that such other person does own the land he cannot afterwards defeat a mechanics lien by insisting that the land is his own,"

The case is directly in point and in the argument of the Court in the

Same Case on page 270 the case of Wendell vs Rensselaer 1 Johnson C.R. 344 and Storrs vs Barker 6 Johnson C.R 166 are cited in support of the principal.

If Holmes and Wickwire had no notice that the Company held a pendens lien on the premises, it was a fraud upon them of which the Emporium Company were the perpetrators, and whether intentional or not, a fraud in fact or fraud in law, its consummation is a fraud which if sustained must prove disastrous to the great mass of mechanics in the Community when this Same Company have numbers of other cases in the Same Condition, if Holmes & Wickwire are defeated in this Case the Em Co will reap a rich harvest of fraud upon the labor of our mechanics in an amount of probably twenty to thirty thousand dollars who are anxiously awaiting the decision of this case

Wm Hunter atty for
Defendants in Error

[8558-38]

Holmes & Wickwire
vs
John Donaldson
and
Erie R R & M.
Company

Argument of
Defts in Error

22

Filed Nov. 24. 1859.
N. Johnston Cl

[5038-39]

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 Pulaski 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* Pulaski *county, before the Judge thereof between* James Holmes and Niles L. Mickevin *plaintiffs and* John Dwelldson & Empirium Real estate Manufacturing Company *defendants it is said manifest error hath intervened to the injury of the aforesaid* John Dwelldson and Empirium Real estate Manufacturing Company *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 plaint 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 Tuesday after the 2d Monday of 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.* John D. Caton *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* Sixth *day of* July *in the year of our Lord one thousand eight hundred and* fifty nine

Noah Davis
Clerk of the Supreme Court.

L8538-407

No 22

SUPREME COURT.

First Grand Division.

John Donaldson and
Emporium Real Estate
Manufacturing Company

Plaintiffs in Error,

VS.

James Helms and
Niles L. McKeon

Defendants in Error.

WRIT OF ERROR.

Issued & FILED - July 6. 1859 -
and made a Supersedeas -
Noah Johnston Jr M

Mond C.S. June 27th 59

Maj. Johnston

Dear Sir: I have sent you the papers in a case in which I wish a Writ of Error, and Supersedeas to issue — you will find the transcript all right I presume. I have also, sent a ~~bond~~ Supersedeas bond, and I want one to issue immediately as the property will be sold in a short time unless proceedings are stayed, and the defendants in Error are not worth anything at all, hence the importance to the plaintiffs in Error that Supersedeas issue instanter. The statutes require the transcript to be examined by one of the judges in vacation before a Supersedeas can issue, but I infer from a rule of the Supreme court in relation to the matter that the Clerk can issue a Supersedeas upon the proper papers being filed — If you cannot do so please let me know immediately

[8538-41]

you will confer a great favor, indeed, if you will just send the papers to Judge Bruce & I will pay you, or send you ~~the~~ whatever amount it may cost to express the papers to the Judge and back. I am not accustomed to your manner of proceeding in appeals and Writs of Error in this State, and, therefore you will do me a favor by letting me know if there is any irregularity in my papers. ~~If Case of~~ If the case is as it seems to me it is a very good ~~good~~, so if you can issue a Supersedeas without a judge inspecting the papers or all you can in this Case. Please write me and let me know if matters are all right. Excuse my haste

Yours truly
J. A. Green

I will send the bond on as it is not ready yet — will send it in a day or two at farthest.

222

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

HOLMES & WICKWIRE, Defendants in Error. vs. EMPORIUM REAL ESTATE AND MANUFACTURING COMPANY, Plaintiff's in Error.	Error to Pulaski.

DEFENDANTS BRIEF OF POINTS AND AUTHORITIES.

1st. There is no abstract of the Record filed by the Plaintiff.

2nd. The bill of exceptions is without date and does not show that the exceptions were taken at the time the decision was made or that it was signed at the trial.

III Scam. 21, 63, IV Gilman 448, XI Ills, 72, 84
V Gilman 456, XIII Ills. 666, 700, XVII Ills. 238

3rd. The article of agreement between Holmes & Wickwire and John Donaldson, which appears as by the Record was in writing and offered in evidence at the trial, is not embodied in the bill of exceptions.

XIII Ills. 572, XII Ills. 379, III Scam. 185
II Gilman 727-8, III Gilman 366-7 IV Scam. 419,
II Scam. 506-7.

4th. The bill of exceptions shows that the Emporium Real Estate and Manufacturing Company by the testimony of H. Hainer, then President of said Company, stood by and saw the building erected by Holmes & Wickwire upon the lot in question.

Statute, page 159, Sec. 22. XIV Ills. 269, Sec. 23.

WM. HUNTER, *Attorney for Defendants in Error.*

Evidence upon the part of Donaldson

[9538-48]

State of Illinois
Supreme Court
First Grand Division
November Term 1859

Holmes & Nickerson
Defendants in Error
vs
Emporium Real Estate
& Manufacturing Company
Plaintiffs in Error

Defendants Brief

22

Filed Nov. 24. 1859.
N. Johnston Clk

JOHN DONALDSON and EMPORIUM COMPANY } Plaintiffs in Error.
vs.
JAMES HOLMES and NILES L. WICKWIRE, } Defendants in Error.

This was a petition for a Mechanic's Lien, filed by Holmes & Wickwire, at the April term of the Pulaski Circuit Court, 1859, against John Donaldson, and praying that the Emporium Company might also be made a party defendant to said petition.

Po. 13 14 15 16 17 20-1 21

The plaintiffs proved that Donaldson entered into a written agreement with them, on or about the 27th of April, 1857, by which he was to pay them $1,000 for furnishing materials and erecting a frame house, of certain dimensions, on a certain lot of ground in Mound City; $25 was to be paid down, which was done, and $500 in six months and the balance on completion of the work. They proved that they commenced the job, and furnished materials and performed work to the amount of seven hundred and fifty dollars and that they were prevented from completing the job by Donaldsons not being able to comply with his part of the contract. Default was taken as to Donaldson; but the Emporium Company filed an answer, setting up amongst other things, that the lot on which said house was partially constructed, belonged to said Company; and proved that on the 17th day of April 1857, John Donaldson purchased lots, 39 & 40, in the Emporium plat of Mound City from said Company; that the Emporium Company executed to Donaldson a certificate of sale of said lots on the following conditions to wit: Donaldson was to pay said Company $1568 for the two lots, and executed his three several promising notes for the same; one for $522.66 payable in one year from date; one for $522.67 payable in two years and one for the same amount as the last payable in three years. If Donaldson failed to pay either of said notes as they became due the Emporium Company reserved the right to absolutely rescind the contract by order of its Board of Directors, at the expiration of ninty days after such failure on the part of Donaldson. Donaldson failed to make the first payment, and the Emporium Company rescinded the contract according to the conditions of the certificate of sale.

There was a condition written on the back of said certificate of sale, requiring Donaldson to construct a frame house of certain dimensions, on one of said lots within one year from the date of the sale; the house partially executed by Holmes and Wickmire was on No. 39 of the above mentioned lots.

Hartzel Hainer was President of the Emporium Company, at the time Donaldson purchased said lots and knew all about the conditions of the sales between the Emporium Company, and Donaldson for the lots; and he, also, at the request of Donaldson, and as a mere matter of accomodation to the parties drew up the agreement between Holmes and Wickmire and Donaldson for the furnishing materials and building said house, but he testifies that said sales were in nowise connected with each other. It was one year and ninty days from the time Donaldson purchased the lots until he forfeited his certificate of sale and the lots reverted back to the Emporium Company. Holmes and Wickmire furnished the material and partially erected the house immediately after Donaldson purchased the lots; but did not attempt to enforce their Lien until after Donaldson had absolutely forfeited all his right, and the lot had reverted back to the Emporium Company.

The Court decreed that Donaldson, or the Emporium Company should pay Holmes and Wickmire the sum of seven hundred and twenty-five ($725) dollars, in sixty days, and if not paid within that time, that the property should be sold and Holmes and Wickmire be first paid out of the proceeds of such sale, and the overplus be paid to the Emporium Company.

The following errors are assigned.

1st. The court erred in decreeing that Donaldson or the Emporium Company should pay Holmes and Wickmire seven hundred and twenty-five dollars, or the property be sold and Holmes and Wickmire be paid first out of the proceeds of such sale.

2d. The court erred in the opinion that Donaldson ever had such an interest in said lot as was subject to a Mechanic's Lien; and, also, in the opinion that if he ever had such an interest, that it was not absolutely determined before Holmes and Wickmire attempted to enforce their Lien.

3d. The court erred in the opinion that Donaldson was the agent of the Emporium Company, and that said Company was responsible to Holmes and Wickwire on the contract entered into between Holmes and Wickwire and Donaldson for furnishing materials and building said house.

Authorities. refered to:—Pruple's Statutes of Illinois, Chap. LXV. Part 11. Page 726. Secs. XVII & XX.

Calvin Steigleman, et. al. vs. A. McBride, 17 Illinois Page 300.-1--2.

T. A. GREEN, Attorney for Plaintiff in Error.

John Donaldson
vs
Holmes & Mickum

Abstract

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

HOLMES & WICKWIRE, Defendants in Error. vs. EMPORIUM REAL ESTATE AND MANUFACTURING COMPANY, Plaintiff's in Error.	Error to Pulaski.

DEFENDANTS BRIEF OF POINTS AND AUTHORITIES.

1st. There is no abstract of the Record filed by the Plaintiff.

2nd. The bill of exceptions is without date and does not show that the exceptions were taken at the time the decision was made or that it was signed at the trial.

III Scam. 21, 63, IV Gilman 448, XI Ills. 72, 84
V Gilman 456, XIII Ills. 666, 700, XVII Ills. 238

3rd. The article of agreement between Holmes & Wickwire and John Donaldson, which appears as by the Record was in writing and offered in evidence at the trial, is not embodied in the bill of exceptions.

XIII Ills. 572, XII Ills. 379, III Scam. 185
II Gilman 727-8, III Gilman 366-7 IV Scam. 419,
II Scam. 506-7.

4th. The bill of exceptions shows that the Emporium Real Estate and Manufacturing Company by the testimony of H. Hainer, then President of said Company, stood by and saw the building erected by Holmes & Wickwire upon the lot in question.

Statute, page 159, Sec. 22. XIV Ills. 269, Sec. 23.

WM. HUNTER, *Attorney for Defendants in Error.*

[8538-44]

State of Illinois
Supreme Court
First Grand Division
November Term 1859

Leolus & Wickwire
Defendants in Error
vs
Empire Real Estate
& Manufacturing Co
Plaintiffs in Error

Defendants Brief

22

Filed Nov. 24. 1859
N. Johnston Clk

JOHN DONALDSON and EMPORIUM COMPANY } Plaintiffs in Error.
vs.
JAMES HOLMES and NILES L. WICKWIRE, } Defendants in Error.

This was a petition for a Mechanic's Lien, filed by Holmes & Wickwire, at the April term of the Pulaski Circuit Court, 1859, against John Donaldson, and praying that the Emporium Company might also be made a party defendant to said petition.

The plaintiffs proved that Donaldson entered into a written agreement with them, on or about the 27th of April, 1857, by which he was to pay them $1,000 for furnishing materials and erecting a frame house, of certain dimensions, on a certain lot of ground in Mound City; $25 was to be paid down, which was done, and $500 in six months and the balance on completion of the work. They proved that they commenced the job, and furnished materials and performed work to the amount of seven hundred and fifty dollars and that they were prevented from completing the job by Donaldsons not being able to comply with his part of the contract. Default was taken as to Donaldson; but the Emporium Company filed an answer, setting up amongst other things, that the lot on which said house was partially constructed, belonged to said Company; and proved that on the 17th day of April 1857, John Donaldson purchased lots, 39 & 40, in the Emporium plat of Mound City from said Company; that the Emporium Company executed to Donaldson a certificate of sale of said lots on the following conditions to wit: Donaldson was to pay said Company $1568 for the two lots, and executed his three several promising notes for the same; one for $522.66 payable in one year from date; one for $522.67 payable in two years and one for the same amount as the last payable in three years. If Donaldson failed to pay either of said notes as they became due the Emporium Company reserved the right to absolutely rescind the contract by order of its Board of Directors, at the expiration of ninty days after such failure on the part of Donaldson. Donaldson failed to make the first payment, and the Emporium Company rescinded the contract according to the conditions of the certificate of sale.

There was a condition written on the back of said certificate of sale, requiring Donaldson to construct a frame house of certain dimensions, on one of said lots within one year from the date of the sale; the house partially executed by Holmes and Wickmire was on No. 39 of the above mentioned lots.

Hartzel Hainer was President of the Emporium Company, at the time Donaldson purchashed said lots and knew all about the conditions of the sales between the Emporium Company, and Donaldson for the lots; and he, also, at the request of Donaldson, and as a mere matter of accomodation to the parties drew up the agreement between Holmes and Wickmire and Donaldson for the furnishng materials and building said house, but he testifies that said sales were in nowise connected with each other. It was one year and ninty days from the time Donaldson purchased the lots until he forfeited his certificate of sale and the lots reverted back to the Emporium Company. Holmes and Wickmire furnished the material and partially erected the house immediately after Donaldson purchased the lots; but did not attempt to enforce their Lien until after Donaldson had absolutely forfeited all his right, and the lot had reverted back to the Emporium Company.

The Court decreed that Donaldson, or the Emporium Company should pay Holmes and Wickmire the sum of seven hundred and twenty-five ($725) dollars, in sixty days, and if not paid within that time, that the property should be sold and Holmes and Wickmire be first paid out of the proceeds of such sale, and the overplus be paid to the Emporium Company.

The following errors are assigned.

1st. The court erred in decreeing that Donaldson or the Emporium Company should pay Holmes and Wickmire seven hundred and twenty-five dollars, or the property be sold and Holmes and Wickmire be paid first out of the proceeds of such sale.

2d. The court erred in the opinion that Donaldson ever had such an interest in said lot as was subject to a Mechanic's Lien; and, also, in the opinion that if he ever had such an interest, that it was not absolutely determined before Holmes and Wickmire attempted to enforce their Lien.

3d. The court erred in the opinion that Donaldson was the agent of the Emporium Company, and that said Company was responsible to Holmes and Wickwire on the contract entered into between Holmes and Wickw ire and Donaldson for furnishing materials and building said house.

Authorities refered to:—Pruple's Statutes of Illinois, Chap. LXV. Part 11. Page 726. Secs. XVII & XX.

Calvin Steigleman, et. al. vs. A. McBride, 17 Illinois Page 300.-1—2.

T. A. GREEN, Attorney for Plaintiff in Error.

[8538-45]

John Donaldson
vs
Adams & McKim

Abstract

No 22 — 18—

Nov. Term 1859.

Donaldson et al.
vs
Holmes et al

Error to Pulaski

Affirmed

8538