No. 8743

Supreme Court of Illinois

John C.Martin, et al,

---

vs.

Reuben C.McCord & Co. et al

Know all men by these presents, that we John C. Martin, John W. Grayson William H. Benton & Joseph W. Maddux are held and firmly bound unto Reuben C. McCord, Charles W. McCord and George H. Garnett in the penal sum of four thousand dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly, severally, and firmly by these presents. Witness our hands and seals this 17th day of April A.D. 1863.

The condition of the above obligation is such, that whereas, the said Reuben C. McCord, Charles W. McCord and George H. Garnett, on a petition, by them, for a mechanic's lien, against Fielder Power and others, in which case, the said John C. Martin, John W. Grayson and William H. Benton impleaded, in the Clinton County Circuit Court, Illinois, on the 8th day of August 1862, said lien was established by said Court upon certain lands discribed in said petition, to the extend of three thousand one hundred and sixty five dollars and thirty three cents; and on the 11th day of March 1863, the said Circuit Court in said case ordered that, if the said sum was not paid in ninety days thereafter, then that the Clerk of said Court

[8743-1]

issue a special execution to the Sheriff of said County, Commanding him to sell said premises specified in said decree, in pursuance of law, that upon the sale thereof he execute a deed to the purchaser or purchasers; from which said decree of said Circuit Court the said John C. Martin, John W. Grayson and William H. Benton impleaded as aforesaid, have sued out a writ of error from the Supreme Court of said State and have prayed for and obtained a supersedeas in said case. Now if the said John C. Martin, John W. Grayson and William H. Benton, shall prosecute their said writ of error with effect, and shall moreover pay the amount of the judgment and decree, costs, interest and damages rendered and to be rendered in said suit, in case the said judgment shall be affirmed in the said Supreme Court, then this Obligation to be void otherwise to remain in full force and effect.

Signed sealed and delivered in our presence by John C. Martin & John W. Grayson — Edmd Pessell, Francis Carpenter

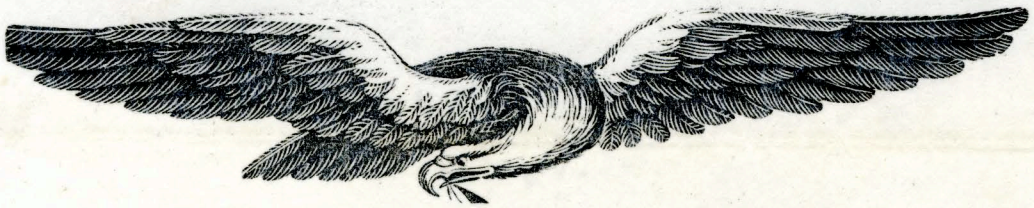
John C. Martin — Seal

John W. Grayson — Seal

Wm H. Benton — Seal

Signed & Sealed by W.H. Benton in our presence — Seal

Jr. W. Maddox — Seal



UNITED STATES OF AMERICA.

STATE OF NEW YORK,
City and County of New York. } ss.

By this Public Instrument be it Remembered, that on this Ninth day of May A. D., one thousand eight hundred and sixty three before me, the subscriber, **Edward Bissell,** a Commissioner in and for the State of New York, appointed by the Governor of the State of Illinois to take proof and acknowledgment of Deeds, Mortgages, Letters of Attorney, or any other Instrument to be used or recorded in the said State of Illinois and to administer oaths and affirmations, take depositions, &c. Personally Came and Appeared John C. Martin and John W. Graydon of the City-County and State of New York the persons described in, and who executed the annexed instrument, and acknowledged to me that they severally executed the same voluntarily and freely for the uses and purposes therein stated, and that the said annexed instrument is their Deed of their several respective free Act and Deed.

And I further Certify, that I know the persons who made the said acknowledgment, to be the identical persons described in, and who executed the said annexed instrument.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal, the year, month and day first before written.

Edward Bissell

Commissioner of the State of Illinois
for the State of New York aforesaid.

No. 271 Broadway. Corner of Chambers St.
FIRST FLOOR over "Shoe and Leather Bank," New York City.

[8743-2]

Geo Ormsby

Herbert Boreham

John C Martin et al
vs.
Reuben C M'Cord et al.

Error from Clinton in Supreme Court Illinois —

I, Joseph W, Maddux hereby enter myself security for costs in this case and acknowledge myself bound to pay or cause to be paid all costs that may accrue in this either to the opposite party or any of the officers of this court in pursuance of the laws of this state

April 17, 1863

J. W. Maddux [Seal]

S8743-3

106

John C. Martin et. al. &c,
vs
Reuben McCord et al

Supersedeas Bond

Filed June 1 - 1863.
N. Johnston Clk

Supreme Court First Grand Division

Brief of Deft

JOHN C. MARTIN, ET AL.
VS.
RUBEN C. McCORD & Co. ET. AL. } **ERROR TO CLINTON.**

I As to the allegations of tittle: These allegations are wholly immaterial; an issue taken upon such does not reach the merits; the replication to the answer of Power only puts in issue the *material allegations* of petition. (See record, page 59.)

2d. The Deed of Campbell to John C. Martin, et al, and part of the record, page 65, 66, 67, 68 and 69, is, if the question was material, conclusive, that Power & Martin were the owners, and 2d, that Martin et al have succeeded to that title, and thirdly that the land described in the bill is the identical land on which the Mill is situated.

3d. It is submitted that Martin et al, succeeded by the deed and proceedings in the U. S. district Court to the *entire* interest in this land and Mill, which Power & Martin may have had, and that the answer of Power, though sworn to, his interest having before the trial absolutely vested in Martin et al, became inopperative as a pleading, except so far as Martin et. al. addopted it. And that Martin et al could not make it their sworn answer, without *swearing* to it, or to a declaration equivalent to swearing to their answer, and therefore such answer was to Martin et al an answer unsworn to and evidence by one witness only. needful to rebut it.

II The petition charges that the items in exhibit X, were purchased by Power & Martin, at $1600 October 1859, to be furnished ready for delivery, as soon as the building should be ready to receive them, and which time said Powers presented would be in January or February next following.

6 Record 6 and 7—That Power & Martin desired an alteration in the size of the engine, and that
7 their agent Eversale made the contract (7th January about) with them to be ready for delivery in two months from that date (Page 7), at an increase of price, $350.

That 21 Jan., 1860. Eversale, Agent, ~~in April~~, made a further contract for a doctor at $300 to be furnished in three months. Also for alteration of Mill irons and machinery, which Complainants agreed to charge usual rates, which were to be done ready for delivery in two months. And
8 other mill castings at 7½ per lb, to be furnished as fast as demanded, and mutually understood that they would be demanded within four months.

9 That the articles were to be paid for when delivered. Avers that all the articles were delivered to and accepted by Defendant, put in the mill. That each article was delivered in less than two years from the date of the contract.

THE ANSWER OF POWER.

55 Admits that Rippy had an agreement to become a partner of Power & Martin, but never really become such partner. That they adopted and contracted for the *identical* machinery in the Rip-
56 py memorandum, ~~assured~~ assumed his *"plan,"* but not his place.

That he has no *recollection* of representing that the building would not be ready to receive machinry before January or February, 1860, *believes* he did not say it, but *admits that the agreement*
56 *was to furnish as soon as the house was ready to receive them.* "The time of delivery, was to depend
56-7 upon the readiness of building to receive them."

57 Denies that Eversale contracted for the enlargement of the Engine, and avers that *he done it* himself.

Denies that the articles were used in a mill upon the tract described; or that they were to be paid for on delivery; or put in a building on the land described in petition. Admits all the articles were received, and in less time than two years—but denies that any time was fixed upon.

III. 1. It is necessary only to prove the contract in substance as alleged.

The ~~errors~~ answer admits the purchase of the identical articles in exhibit X. Admits the contract of larger Engine, (whether purchased by agent or himself it is his contract) the price is admitted, and the time of *delivery* made certain by limiting it to the time the building was ready to receive them, and which the answer also admits. The answer further admits that the material was delivered and accepted.

The allegations in the bill of delivery in two months is shown to be based upon the time of
7 completion of the building. (Record p. 7.)

And it is contended that the *time* of delivery, is in a contract to furnish material, sufficiently certain which is fixed to depend upon the time of the erection of the building, and a mutual understanding exists as to when that will occur; to-wit, about two months.

The averment that the material was to be paid for on delivery, is sustained by proof that no time was agreed upon in the contract for credit. The admission that Power makes in his answer that he bought the indentical items in exhibit X; and adopted his plans and the prices, and the evidence of Eversale is explicit. 24 Ill. 110. The identity of the Mill and land is sufficiently established. 28 Ill. 457.

H K S O'Melveny
for Appll

2

Martin et al
vs
R. C. McCord et al

Deft's Brief

2

Filed, Nov. 15. 1864.
N. Johnston Clk

Supreme Court.

STATE OF ILLINOIS.

FIRST GRAND DIVISION.

JOHN C. MARTIN, JOHN W. GRAYSON, and WILLIAM H. BENTON, impleaded, &c.
vs.
RUEBEN C. McCORD, ET AL.
} ERROR TO CLINTON.

This was a bill in Chancery to enforce a Mechanics Lien, filed by McCord & Co., against Power and Morton, &c., on the 24th of July, A. D. 1860, in the Clinton Circuit Court. It alleges that Lorenzo P. Sanger, on the first of
Page 1. February, 1858, owned the premises in question, and on that day conveyed an undivided one-fourth thereof to Fielder Power, and on the same day gave a power of attorney to Power to sell and dispose of the other three-fourths; and on the 15th of June, 1859, Sanger conveyed said three-fourths to John Brown as trustee for Sanger, Camp & Co., who con-
4. stituted Power his attorney in fact to sell said three-fourths of said land. And on the same day Power under said authority agreed to convey to Wm. Morton, one undivided half of said premises for a consideration paid; and on the same day Brown as trustee agreed to convey to Powers for a consideration paid one-fourth of said land. That
5. Power and Morton on the 1st of September, 1859, commenced the erection thereon of a steam flouring mill. That after sundry arrangements with complainants, George H. Eversal, agent for Power & Morton, on the 7th of Janu-
7. ary, 1860, agreed with complainants for an engine and appendages, articles mentioned in exhibit X, "*to be furnished ready for delivery within the space of two months from that date*" for $1950; and on the 21st of January 1860, Eversal as agent for Power & Morton, purchased a doctor for $300, to be furnished in three months, also contracted with
8. complainants to alter mill irons and machinery which should be sent to complainants at, the "*usual rates*" to be performed within "*two months from that date.*" Also a further contract was made at the same time that castings and mill machinery were to be furnished by said complainants for said mill at 7 1-2 cents per lb., "*to be ready for delivery within four months.*" That said articles were to be used as contracted for, on said land, and to be paid for on delivery; and were delivered between October 5th, 1859 and May 31st 1860, as per date of items in account, and were used in said mill, &c. The bill makes all persons supposed to have a legal title to said land parties and others supposed to have mechanics' liens, and prays a degree establishing complainants' lien and a sale, &c. The amended bill is in the record as per pages 1 to 14 and 51 and 52.

52. Power in his answer on oath admits that Sanger owned said land, but denies Sanger conveyed 1-4th to Powers,
53. and denies that the other conveyances, &c., cover this land. Admits Power and Morton erected said mill and that
56. Power contracted with complainants for said engine and machinery, says no time was fixed when complainants were to commence the delivery thereof, but that was to depend upon the readiness of the house to receive the same. Denies that Eversal was authorized to make the contract, and alleges that Power in person made said contract for a larger engine for $1950. Admits the charges as to mill alterations, but denies the same worth at the usual rates $105. Denies the articles were to be paid for when delivered, but a credit was to be given, and denies that the articles by the contract were to be used in a mill on this tract of land. Admits the delivery of the articles, but denies that any time
58. was fixed in which the delivery was to be completed. Alleges that payment was to be made at intervals after de-
59. livery within one year from the time the delivery was completed. To this answer complainants filed a replication. Sundry others impleaded, claiming also mechanics' liens, to which answers by Power and Morton were filed. See
64. record pages 43 to 46 and 58 to 64. To which several answers there was a replication. On the 6th of
65. August, 1862, John C. Martin, John W. Grayson and William H. Benton, filed their petition to be made parties, and alleged that by judicial proceedings in the United States Circuit Court for the Southern District of the State of Illi-
67, nois, they had acquired the title of said Power & Morton to said land and asked to be allowed to adopt the answer
68. of said Powers to said bill and bills of interpleaders; which application was allowed and complainants filed to said pe-
82. tition a replication admitting said petition to be true but claiming their lien.

On the 8th of August, 1862, a jury was sworn in the case of complainants and found as follows: "We, the jury
83. find for the plaintiffs the sum of $3218-57;" whereupon plaintiffs remitted $52-52. A motion for a new trial was overruled, and a lien established for complainants on said land for $3165-33 and costs, and the case continued. On the 11th of March, 1863 an order was made by said Court in said case, that if said sum was not paid in ninety days
96. a special execution issue to the Sheriff of said county, to sell and convey said premises to the purchaser or purchasers.

A bill of exceptions discloses all the evidence as follows: Zopher Case testified that Power & Morton commenced erecting the mill in question in the fall of 1859, on the ground described in complainant's bill which witness measured and wrote part of the description in said bill. G. H. Eversoll testified that he is a Master Mill Wright and came
85 to Carlyle in December 1859, and was employed by Power & Morton on said mill. Witness was authorized by them to go to St. Louis in the forepart of January 1860, and to contract with plaintiffs for said engine, &c., which witness did for $1950; also for a doctor at $300; also for the repairs of old machinery, which witness did at 7½ cents per pound, which contracts Power & Morton ratified and approved. There was no time named for the payment of them. They were to be furnished as soon as needed, except the Doctor, which witness thinks was to be furnished in three months. The articles were for the mill of Power and Morton & Co. at Carlyle and so referred to in the contract, but no discription of the lot was stated. When witness first came to Carlyle the mill was up and enclosed.
87. Witness identified the engine and items of $1950 and Doctor. They were to be ready when needed.

Witness also examined exhibit A which Power and Morton admitted and asked witness to examine the prices of articles. Witness testified that the prices charged were reasonable and fair for such articles. They were received as fast as needed and all put in the mill before June 20, 1860.

Case (recalled) testified that Power and Morton were not at the time connected with the building of any other mill. This was all the material evidence.

It is now assigned for error:

1st. The Court below erred in overruling the motion for a new trial.

2nd. In ordering a sale of the premises without disposing of the other supposed liens.

3d. In seeking to transfer the title of all the parties to said suit.

4th. In giving so short a time as only ninety days to redeem and rendering the decree in manner and form as made.

BRIEF.

1. *Variances.*—The case and contract as alleged must be proved. 21 Ills. R. 625, 23 Id. 646, 2 Scam. R. 216, 13 Ills. R. 386, 1 Gilm. R. 425, 5 Id. 499, 4 Id. 566.

Bill alleges that the equitable title of the premises was in Power and Morton. This is denied in the answer and is not proved. The bill alleges McCord & Co. agreed to furnish the engine and appendages within two months from date of contract. This is denied in the answer and Eversoll swears that it was to be furnished when needed.

Bill alleges that mill irons were by contract to be altered at usual rates within two months,—Eversoll swears no time was fixed and 7½ cents per pound was to be paid.

Bill alleges that the castings and machinery were to be furnished within four months after demand. Eversoll swears they were to be furnished, when needed.

2. The answer of Powers denying the title and contracts as alleged could not be overcome by one witness alone as to these points. 1 Gilm. R. 434, 24 Ills. R. 24.

3. It is apparent from the proof that it was no part of the contract for the materials, that the same should be put on this particular tract of land, and therefore there can be no lien on the same. 24 Ills. R. 532, 25 Id. 349.

4. All the points in controversey by the bill and the answer of Powers should have been submitted to the jury and passed upon by them; whereas they only found the amound due complainants and failed to find upon the other essential points in controversey by the pleadings to entitle complainants to a lien. 13 Ill. R. 532, 533.

5. The Time (90 days) given to redeem by payment of so large a sum of money to wit $3165 33-100 was wholly inadequate, and for that reason the decree should be reversed. 27 Ills. R. 501.

UNDERWOOD & NOETLING,
Atty's. for pltffs. in error.

[8743-5]

106

John C. Martin, John W. Grayson & William H. Benton Impleaded &c.
vs.
Reuben C. McCord et al.

Error to Clinton

Abstract & Brief

Filed June 1. 1863.

N. Johnston Clk

Supreme Court. State of Illinois
1st Grand Division

John C Martin
John W. Grayson &
William C. Benton impleaded &c, } Error to Clinton.

vs.

Reuben L. McCord
et al.

This was a bill in chancery to
enforce a Mechanic's Lien filed by McCord & Co.
Page 1. against Power & Morton &c. on the 24th of July A. D.
1860 in the Clinton Circuit Court. It alleges that
Lorenzo P. Sanger on the 1st of Feby 1858 owned the
" 3 premises in question and that day conveyed an undi-
vided 1/4th thereof to Fielder Power and on the same
day gave a power of attorney to Power to sell and dis-
pose of the other 3/4th; and on the 15th of June 1859 Sanger conveyed
said 3/4th to John Brown as trustee for Sanger, Camp & Co
4 and on the same day said trustee with the consent
of Sanger, Camp & Co. constituted Power his attorney in
fact to sell said 3/4th of said land. And on the same
day Power under said authority agreed to convey to
Wm Morton one undivided half of said premises for a con-
sideration paid, and on the same day Brown as trus-
tee agreed to convey to Powers for a consideration
5 paid 1/4th of said land. That Power and Morton on the 1st
of Sept. 1859 commenced the erection thereon of a Steam
flouring mill. That after sundry arrangements with

L5743-4

& Morton

complainants. George H. Eversole agent for Power & on the
7th of January 1860 agreed with complainants for an
engine and appendages, articles mentioned in exhibit
7 X "to be furnished ready for delivery within the space
of two months from that date" for $1950; and on the 21st
of January 1860, Eversole as agent for Power & Morton
purchased a doctor for $300, to be furnished in three months,
also contracted with complainants to alter mill irons
8 and machinery which should be sent to complainants
at "the usual rates" to be performed within "two
months from that date," Also a further contract
was made at the same time that castings and
mill machinery were to be furnished by said complain-
ants for said mill at 7½ cents per lb, "to be ready
for delivery within four months." That said articles
were to be used as contracted for, on said land
and to be paid for on delivery; and were delivered
between Oct. 5th 1859 & May 31st 1860 as per date of items
in account and were used in said mill, &c. The bill
makes all persons supposed to have a legal title to
said land parties and others supposed to have mechan-
ics liens. & prays a decree establishing complainants
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" 52 Power in his answer on oath admits Sanger owned
said land, but denies that Sanger conveyed ¼ to
53 Powers & denies that the other conveyances &c. cover this
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and alleges that Power in person made said contract
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Admits the delivery of the articles, but denies that
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See record pages 42 to 46 & 58 to 64, to which several
64 answers there was a replication. On the 6th of
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L8743-71

said Power & Morton to said land, and asked to be allowed to adopt the answers of said Powers to said bill and bills of interpleaders; which appli-
82 cation was allowed and complainants filed to said petition a replication admitting said petition to be true but claiming their lien.
83 On the 8th of August 1862 a jury was sworn in the case of complainants and found as follows. "We the jury find for the pltffs. the sum of $3218 57/100" whereupon pltffs. remitted $52 52/100. A motion for a new trial was overruled & a lien established for complainants on said land for $3165 33/100 and costs and the case con-
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85 A bill of exceptions discloses all the evidence as follows; Zopher Case testified that Power & Morton commenced erecting the mill in question in the fall of 1859 on the ground described in complainants bill which witness measured and was part of the description in said bill. G. H Eversall testified that he is a Master Mill wright and came
86 to Carlyle in December 1859 and was employed by Powers & Morton on said mill. Witness was an-

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and all put in the mill before June 20. 1860.
Case (recalled) testified that Power & Morton were
not at the time connected with the building of
any other mill. This was all the material
evidence.

It is now assigned for error;

1st The Court below erred in overruling

[3743-8]

the motion for a new trial.

2d In ordering a sale of the premises without disposing of the other supposed liens.

3d In seeking to transfer the title of all the parties to said suit.

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Brief

1. Variances— The case and contract as alleged must be proved. 21 Ills. R. 625, 23 Id. 646, 2 Scam. R. 216, 13 Ills R. 386. 1 Gilm R. 425, 5 Id. 499. 4 Id. 566.

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Bill alleges that mill irons were by contract to be altered at usual rates within two months— Eversoll swears no time was fixed and 7½ cents per pound was to be paid.

Bill alleges that the castings and machinery were to be furnished within four months after demand. Eversoll swears they were to be furnish

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3 It is apparent from the proof that it was no part of the contract for the materials, that the same should be put on this particular tract of land, and therefore there can be no lien on the same 24 Ills R. 532, 25 Id. 349

4th All the points in controversy by the bill and the Answer of Powers should have been submitted to the jury and passed upon by them, whereas they only found the amount due complainants and failed to find upon the other essential points in controversy by the pleadings to entitle complainants to a lien. 13 Ill. R. 532 533.

5th The time (90 days) given to redeem by payment of so large a sum of money to wit $3165 33/100 was wholly inadequate and for that reason the decree should be reversed. 27 Ills. R. 501.

Underwood & Northing
Attys for pltffs. in error

[5743-9]

No 6

John C. Martin, for use
W. Grayson & William
C. Barton impleaded &c.
vs.
Reuben C. McCord et al

Error to Clinton

Abstract & Brief

Filed June 1st 1863.
A. Bronson Clk

State of Illinois }
Clinton County } W^m H Underwood being
duly sworn says he verily believes Joseph W
Maddox of Carlyle is worth four
thousand dollars above all debts
& liabilities. W^m H Underwood
Subscribed & sworn to before me
this 16th April 1863
Sidney Breese Judge Sup. Court

Supreme Court Stark Grand Decision

Brief of Points

JOHN C. MARTIN, ET AL.
vs.
RUBEN C. McCORD & Co. ET. AL. } **ERROR TO CLINTON.**

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7 their agent Eversale made the contract (7th January about) with them to be ready for delivery in two months from that date (Page 7), at an increase of price, $350.

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Denies that the articles were use in a mill upon the tract described; or that they were to be paid for on delivery; or put in a building on the land described in petition. Admits all the articles were received, and in less time than two years—but demurs that any time was fixed upon.

III. 1. It is necessary only to prove the contract in substance as alleged.

The ~~errors~~ answer admits the purchase of the identical articles in exhibit X. Admits the contract of larger Engine, (whether purchased by agent or himself it is his contract) the price is admitted, and the time of *delivery* made certain by limiting it to the time the building was ready to receive them, and which the answer also admits. The answer further admits that the material was delivered and accepted.

The allegations in the bill of delivery in two months is shown to be based upon the time of
7 completion of the building. (Record p. 7.)

And it is contended that the *time* of delivery, is in a contract to furnish material, sufficiently certain which is fixed to depend upon the time of the erection of the building, and a mutual understanding exists as to when that will occur; to-wit, about two months.

The averment that the material was to be paid for on delivery, is sustained by proof that no time was agreed upon in the contract for credit. The admission that Power makes in his answer that he bought the indentical items in exhibit X; and adopted his plans and the prices, and the evidence of Eversale is explicit. 24 Ill. 110. The identity of the Mill and land is sufficiently established. 28 Ill. 457.

[B743-10]

H K S Dillman for Dft in error

Martin et al

vs

R. C. McCord et al

Defts Brief

2

Filed, Nov. 15, 1864.

N. Johnston Clk

53. and denies that the other conveyances, &c., cover this land. Admits Power and Morton erected said mill and that
56. Power contracted with complainants for said engine and machinery, says no time was fixed when complainants were to commence the delivery thereof, but that was to depend upon the readiness of the house to receive the same. Denies that Eversal was authorized to make the contract, and alleges that Power in person made said contract for a larger engine for $1950. Admits the charges as to mill alterations, but denies the same worth at the usual rates $105. Denies the articles were to be paid for when delivered, but a credit was to be given, and denies that the articles by the contract were to be used in a mill on this tract of land. Admits the delivery of the articles, but denies that any time
58. was fixed in which the delivery was to be completed. Alleges that payment was to be made at intervals after de-
59. livery within one year from the time the delivery was completed. To this answer complainants filed a replication. Sundry others impleaded, claiming also mechanics' liens, to which answers by Power and Morton were filed. See
64. record pages 43 to 46 and 58 to 64. To which several answers there was a replication. On the 6th of
65. August, 1862, John C. Martin, John W. Grayson and William H. Benton, filed their petition to be made parties, and alleged that by judicial proceedings in the United States Circuit Court for the Southern District of the State of Illi-
67, nois, they had acquired the title of said Power & Morton to said land and asked to be allowed to adopt the answer
68. of said Powers to said bill and bills of interpleaders; which application was allowed and complainants filed to said pe-
82. tition a replication admitting said petition to be true but claiming their lien.

On the 8th of August, 1862, a jury was sworn in the case of complainants and found as follows: "We, the jury
83. find for the plaintiffs the sum of $3218-57;" whereupon plaintiffs remitted $52-52. A motion for a new trial was overruled, and a lien established for complainants on said land for $3165-33 and costs, and the case continued. On the 11th of March, 1863 an order was made by said Court in said case, that if said sum was not paid in ninety days
96. a special execution issue to the Sheriff of said county, to sell and convey said premises to the purchaser or purchasers.

A bill of exceptions discloses all the evidence as follows: Zopher Case testified that Power & Morton commenced
85 erecting the mill in question in the fall of 1859, on the ground described in complainant's bill which witness measured and wrote part of the description in said bill. G. H. Eversoll testified that he is a Master Mill Wright and came to Carlyle in December 1859, and was employed by Power & Morton on said mill. Witness was authorized by them to go to St. Louis in the forepart of January 1860, and to contract with plaintiffs for said engine, &c., which witness did for $1950; also for a doctor at $300; also for the repairs of old machinery, which witness did at 7½ cents per pound, which contracts Power & Morton ratified and approved. There was no time named for the payment of them. They were to be furnished as soon as needed, except the Doctor, which witness thinks was to be furnished in three months. The articles were for the mill of Power and Morton & Co. at Carlyle and so referred to in the contract, but no discription of the lot was stated. When witness first came to Carlyle the mill was up and enclosed.
87. Witness identified the engine and items of $1950 and Doctor. They were to be ready when needed.

Witness also examined exhibit A which Power and Morton admitted and asked witness to examine the prices of articles. Witness testified that the prices charged were reasonable and fair for such articles. They were received as fast as needed and all put in the mill before June 20, 1860.

Case (recalled) testified that Power and Morton were not at the time connected with the building of any other mill. This was all the material evidence.

It is now assigned for error:

1st. The Court below erred in overruling the motion for a new trial.

2nd. In ordering a sale of the premises without disposing of the other supposed liens.

3d. In seeking to transfer the title of all the parties to said suit.

4th. In giving so short a time as only ninety days to redeem and rendering the decree in manner and form as made.

BRIEF.

1. *Variances.*—The case and contract as alleged must be proved. 21 Ills. R. 625, 23 Id. 646, 2 Scam. R. 216, 13 Ills. R. 386, 1 Gilm. R. 425, 5 Id. 499, 4 Id. 566.

Bill alleges that the equitable title of the premises was in Power and Morton. This is denied in the answer and is not proved. The bill alleges McCord & Co. agreed to furnish the engine and appendages within two months from date of contract. This is denied in the answer and Eversoll swears that it was to be furnished when needed.

Bill alleges that mill irons were by contract to be altered at usual rates within two months,—Eversoll swears no time was fixed and 7½ cents per pound was to be paid.

Bill alleges that the castings and machinery were to be furnished within four months after demand. Eversoll swears they were to be furnished, when needed.

2. The answer of Powers denying the title and contracts as alleged could not be overcome by one witness alone as to these points. 1 Gilm. R. 434, 24 Ills. R. 24.

3. It is apparent from the proof that it was no part of the contract for the materials, that the same should be put on this particular tract of land, and therefore there can be no lien on the same. 24 Ills. R. 532, 25 Id. 349.

4. All the points in controversey by the bill and the answer of Powers should have been submitted to the jury and passed upon by them; whereas they only found the amound due complainants and failed to find upon the other essential points in controversey by the pleadings to entitle complainants to a lien. 13 Ill. R. 532, 533.

5. The Time (90 days) given to redeem by payment of so large a sum of money to wit $3165 33-100 was wholly in adequate, and for that reason the decree should be reversed. 27 Ills. R. 501.

UNDERWOOD & NOETLING,
Atty's. for pltffs. in error.

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

I hereby certify that a writ of error hath ifsued from this Office for the reversal of a Judgment obtained by Reuben C. McCord, Charles W. McCord & George H. Garrett *Against* John C. Martin, John W. Grayson, I. Grayden & William H. Benton impleaded with Julian Power and others *in the Circuit Court of* Clinton *County at the* August *Term, in the year of our Lord one thousand eight hundred and* Sixty two *in a certain action of* bill in Chancery to enforce Mechanic's 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* first *day of* June *in the year of our Lord one thousand eight hundred and* Sixty-three

Noah Johnston
Clerk of the Supreme Court.

106

SUPREME COURT.

First Grand Division.

John C. Martin, John W. Graydon & William H. Benton - Impleaded &c Pltffs in error

vs

Reuben C. McCord, Shff. W. McCord and George H. Garnett Defts in error

WRIT OF SUPERSEDEAS.

To Shff & Circuit Clk of Clinton Co. Ills & to all concerned

FILED.

John C Martindale
vs
Ruben C McCord & al
et al

Edwd Clarton

And the 1st Defts in error
comes, & for joinder in error says that
in the R'd record in manner & form as the
proceedings are thereinrecited & in the
assignment of error therein there is no
error appears, Wherefore &c

O'Mahony & Sparks for
Defts in error.

Supreme Court. First Judicial District

Brief of Defts

JOHN C. MARTIN, ET AL.
vs.
RUBEN C. McCORD & Co. ET. AL. } **ERROR TO CLINTON.**

I As to the allegations of tittle: These allegations are wholly immaterial; an issue taken upon such does not reach the merits; the replication to the answer of Power only puts in issue the *material allegations* of petition. (See record, page 59.)

2d. The Deed of Campbell to John C. Martin, et al, and part of the record, page 65, 66, 67, 68 and 69, is, if the question was material, conclusive, that Power & Martin were the owners, and 2d, that Martin et al have succeeded to that title, and thirdly that the land described in the bill is the identical land on which the Mill is situated.

3d. It is submitted that Martin et al, succeeded by the deed and proeeedings in the U. S. district Court to the *entire* interest in this land and Mill, which Power & Martin may have had, and that the answer of Power, though sworn to, his interest having before the trial absolutely vested in Martin et al, became inopperative as a pleading, except so far as Martin et. al. addopted it. And that Martin et al could not make it their sworn answer, without *swearing* to it, or to a declaration equivalent to swearing to their answer, and therefore such answer was to Martin et al an answer unsworn to and evidence by one witness only suffient to contradict it.

II The petition charges that the items in exhibit X, were purchased by Power & Martin, at $1600 October 1859, to be furnished ready for delivery, as soon as the building should be ready to receive them, and which time said Powers presented would be in January or February next following.

6 Record 6 and 7—That Power & Martin desired an alteration in the size of the engine, and that
7 their agent Eversale made the contract (7th January about) with them to be ready for delivery in two months from that date (Page 7), at an increase of price, $350.

That 21 Jan., 1860. Eversale, Agent, ~~in April~~, made a further contract for a doctor at $300 to be furnished in three months. Also for alteration of Mill irons and machinery, which Complainants agreed to charge usual rates, which were to be done ready for delivery in two months. And
8 other mill castings at 7½ per lb, to be furnished as fast as demanded, and mutually understood that they would be demanded within four months.

9 That the articles were to be paid for when delivered. Avers that all the articles were delivered to and accepted by Defendant, put in the mill. That each article was delivered in less than two years from the date of the contract.

THE ANSWER OF POWER.

55 Admits that Rippy had an agreement to become a partner of Power & Martin, but never really become such partner. That they adopted and contracted for the *identical* machinery in the Rip-
56 py memorandum, assured his "*plan*," but not his place.

That he has no *recollection* of representing that the building would not be ready to receive machinry before January or February, 1860, *believes* he did not say it, but *admits that the agreement*
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Denies that the articles were use in a mill upon the tract described; or that they were to be paid for on delivery; or put in a building on the land described in petition. Admits all the articles were received, and in less time than two years— but demurs that any time was fixed upon.

III. 1. It is necessary only to prove the contract in substance as alleged.

The ~~error~~ admits the purchase of the identical articles in exhibit X. Admits the contract of larger Engine, (whether purchased by agent or himself it is his contract) the price is admitted, and the time of *delivery* made certain by limiting it to the time the building was ready to receive them, and which the answer also admits. The answer further admits that the material was delivered and accepted.

The allegations in the bill of delivery in two months is shown to be based upon the time of
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The averment that the material was to be paid for on delivery, is sustained by proof that no time was agreed upon in the contract for credit. The admission that Power makes in his answer that he bought the indentical items in exhibit X; and adopted his plans and the prices, and the evidence of Eversale is explicit. 24 Ill. 110. The identity of the Mill and land is sufficiently established. 28 Ill. 457.

J & K S O'Melveny
for Defts in error

2

Martin et al
vs
McCord et al

Defts Brief

2

Filed, Nov. 15, 1864.
N. Johnston Clk

Supreme Court, First Grand Division

Brief of Deg's

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vs.
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[8743-15]

A K & O'Melveny
for Defendants

Martin et al
vs
R C McCord et al

Defts Brief

No 2.

Filed Nov 15. 1864
N Johnston Clk

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

The People of the State of Illinois,

To the Sheriff of Clinton *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* Clinton *county, before the Judge thereof between* Reuben C. McCord, Charles W. McCord and George H. Garnett *plaintiffs, and* John C. Martin, John W. Grayston & William A. Benton *impleaded with* Fullen Power & Others *defendants it is said that manifest error hath intervened to the injury of said* John C. Martin, John W. Grayston & William A. Benton impleaded &c. *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* Reuben C. McCord, Charles W. McCord and George H. Garnett

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* R. C. McCord, C. W. McCord & G. H. Garnett *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* first *day of* June *in the year of our Lord one thousand eight hundred and* sixty three.

Noah H. Preston
Clerk of the Supreme Court.

[87434]

State of Illinois } SS I have executed the within
Clinton County } by reading the same to T S Smith
Clerk of the Circuit Court of Clinton County
and have diligently Enquired and cannot find the within
named defendants in appeal in my County
Carlyle July 9th 1863
R S McDowne Sheriff
By J M D Taylor Depty

No 6

SUPREME COURT.

First Grand Division.

John C. Martin, John W Graydon & Wm H. Benton — Impleaded &c

Plaintiffs in Error,

VS.

Reuben C. McCord, Charles W. McCord & George H. Garrett

Defendants in Error.

SCIRE FACIAS.

Fees Service 50
Return 10

FILED.

The Writ of Error issued and filed in this cause, is made a Supersedeas - and as such, is to be obeyed by all Concerned

Noah Johnston Cl

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 Clinton *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* Clinton *county, before the Judge thereof between* Reuben C. McCord, Charles W. McCord and George H. Garnett *plaintiffs and* John C. Martin, John W. Graydon and William H. Benton impleaded with Julian Power and others *defendants it is said manifest error hath intervened to the injury of the aforesaid* John C. Martin, John W. Graydon & William H. Benton impleaded &c. *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 2nd 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.* John D. Caton *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* first *day of* June *in the year of our Lord one thousand eight hundred and* Sixty three.

Noah H. Purston
Clerk of the Supreme Court.

4

[9743-17]

No 6

SUPREME COURT.

First Grand Division.

John Collatin, John W. Graydon & William H. Benton Impleaded &c

Plaintiffs in Error,

VS.

Reuben C. McCord, Charles W. McCord & George H. Garrett

Defendants in Error.

WRIT OF ERROR.

Issued. Made a Supersedeas and

FILED June 1-1863-

N. Johnston Clk

This writ of Error is made a Supersedeas, and is to be obeyed accordingly

Noah Johnston Clk