

New-Jersey Court of Errors & Appeals.

State of New Jersey, ss.

DAVID K. CRAIG,

Plaintiff in Error,

vs

WILLIAM K. SMITH,

Defendant in Error.

Assignment

of

Errors.

The State of New Jersey
to our Circuit Court of
the County of Somerset,
GREETING:

[L. S.]

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain action which was in our said Circuit Court, between David K. Craig and William K. Smith, in a plea of trespass on the case upon promises, as it is said manifest error hath intervened, to the great damage of the said David K. Craig, as by his complaint we are informed, we being willing that the error (if any there be) should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then without delay, you distinctly and openly and

under your seal, the record, proceedings and judgment aforesaid with all things concerning the same, to our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the third Tuesday of June next, together with this writ, that the record, proceedings and judgment aforesaid being inspected, we may cause to be done thereupon what of right, and according to the Constitution and laws of this State ought to be done.

Witness, Hon. THEODORE RUNYON, Chancellor, &c, at
10 Trenton, this first day of May, A. D., one thousand eight hundred and seventy-four.

KELSEY, Clerk.

I. N. DILTS, Att'y.

SOMERSET CIRCUIT COURT of the fifth day of December, A. D. eighteen hundred and seventy-three.
SOMERSET COUNTY, ss.

20 WILLIAM K. SMITH was summoned to answer unto DAVID K. CRAIG in a plea of trespass on the case upon promises, and thereupon the said DAVID K. CRAIG by ISAIAH N. DILTS, his Attorney, complains, for that *whereas* the said plaintiff at the times hereinafter mentioned, was a dealer in roofing slates, and also engaged in the business of putting slate roofs upon houses and other buildings; and the said defendant having contracted and agreed with one Asa R. Dilts, a master workman and builder to construct and build for the said defendant a certain dwelling house in Somerville, to wit: at Bridgewater, in the county of Somerset aforesaid, which said contract and agreement for the building of said house was reduced to writing and filed
30 in the Clerk's office of the county of Somerset, before the

delivery of the goods and the performance of the work hereinafter mentioned, to wit: at Bridgewater aforesaid, and the said plaintiff in fact, saith that after the filing of said contract, to wit: on the eleventh day of August, A. D. eighteen hundred and seventy-three, at Bridgewater aforesaid, the said plaintiff sold and delivered to the said Asa R. Dilts, being such builder and contractor as aforesaid, divers large quantities of roofing slates to be used by him in the building and erection of said dwelling house of the defendant, and which the said plaintiff avers were in fact used therein, and for putting said slates on said building, with chimneys, &c, at and for such reasonable prices as were then and there agreed upon by and between the said plaintiff and the said Asa R. Dilts, contractor as aforesaid, amounting in the whole to a large sum of money, to wit: the sum of one hundred and ninety-five dollars and seventy-two cents, to wit: at Bridgewater, in the county of Somerset aforesaid ; and the said plaintiff in fact further saith that afterwards, to wit: on the tenth day of September, A. D. eighteen hundred and seventy-three, the said plaintiff demanded of the said Asa R. Dilts, payment for said roofing slates, chimneys, &c., so as aforesaid sold and delivered to him by the said plaintiff, and used in the direction and completion of the said dwelling house of the said defendant, as well as payment for putting said roofing slates, chimneys, &c., on said dwelling house, by the said plaintiff as aforesaid, yet the said Asa R. Dilts wholly neglected and refused to pay the said plaintiff for the same, or any part thereof, to wit: at Bridgewater aforesaid, and the said plaintiff in fact further saith, that the said Asa R. Dilts did build, erect, and complete the said dwelling house for the said defendant, and did use therein the roofing slates, chimneys, &c., sold and furnished by the said plaintiff to the said Asa

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R. Dilts, as aforesaid, and the said plaintiff did place and secure the same on said dwelling house at the request of the said Asa R. Dilts, in pursuance of said agreement between them as aforesaid, and the said plaintiff in fact further saith, that on the day and year last aforesaid the said defendant was then and still is indebted to the said Asa R. Dilts, as contractor and builder as aforesaid, for the erection and completion of said dwelling house for him in the sum of four hundred dollars, the same being a greater

10 amount than the sum of the said plaintiff's claim against the said defendant, and the said defendant being so indebted to the said Asa R. Dilts as aforesaid, the said plaintiff on the day and year last aforesaid, to wit : September the tenth, A. D. eighteen hundred and seventy-three, at Bridgewater aforesaid, gave to the said defendant, a notice in writing that the said Asa R. Dilts was indebted to the said plaintiff in the sum of one hundred and ninety-five dollars and seventy-two cents, that he had demanded payments of the same of the said Asa R. Dilts, and that he

20 the said Asa R. Dilts had refused to make payment of the same, or any part thereof, and that the said defendant should retain the amount due to the said plaintiff, and so claimed by him out of the money in the hands of the said defendant belonging and due to the said Asa R. Dilts according to law, to wit : at Bridgewater aforesaid, and the said plaintiff in fact further saith that the said defendant was then and there satisfied of the correctness of the said plaintiff's demand, and that the said plaintiff had demanded payments of the same from the said Asa R. Dilts,

03 and that he the said Asa R. Dilts had refused and neglected to make payment thereof, or any part thereof as aforesaid, by means whereof, and by force of the Statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money so

due and owing to the said plaintiff for the said roofing slates and chimneys, &c., and the putting thereon in the erection of said dwelling house for the said defendant, and being so liable he the said defendant in consideration thereof afterwards, to wit : on the day and year last aforesaid at Bridgewater, in the county of Somerset aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money, when he the said defendant should be thereunto afterwards requested. Yet the said defendant although often requested so to do, 10 hath not as yet paid the said plaintiff the said sum of money or any part thereof, but so to do hath hitherto wholly neglected and refused, still doth neglect and refuse to the damage of the said plaintiff of four hundred dollars, and therefore he brings suit, &c.

I. N. DILTS, Att'y of Plt'ff.

The following is a copy of the account, and a bill of the particulars of the demand of the said plaintiff, and for the recovery of the amount due thereon this action is brought.

WILLIAM K. SMITH,

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To DAVID K. CRAIG, DR.

1873, Aug. 11th,	To 2002 feet slate at 8 1-2c.	\$170 17
" Aug. 11th,	" 3 chimneys at \$2,	6 00
" " "	" 33 ft. apron at 10c.	3 30
" " "	" 87 ft. zinc at 15c.	13 05
" " "	" 20 sheets tin at 16c.	3 20
	Amount to	<u>\$195 72</u>

For which amount, with interest thereon, plaintiff will claim judgment.

SOMERSET COUNTY CIRCUIT COURT, of the Term
of December, A. D. eighteen hundred and seventy-
three.

WILLIAM K. SMITH,	}	<i>In Case.</i>
<i>Defendant.</i>		
<i>Ads'm,</i>		<i>Plea.</i>
DAVID K. CRAIG,		
<i>Plaintiff.</i>		

And the said WILLIAM K. SMITH, the defendant, by
10 GASTON & BERGEN, his Attorneys, comes and defends the
wrong and injury, when, &c., and says that he did not un-
dertake and promise in manner and form as the said plain-
tiff hath above thereof declared against him, and of this
he puts himself upon the country, and the said plaintiff
doth the like.

GASTON & BERGEN,
Att'ys of Defendant.

The above plea by consent is filed without verification,
and the usual affidavit thereto by the defendant is hereby
20 waived.

I. N. DILTS,
Att'y of Pl'ff.

SOMERSET CIRCUIT COURT,

February 10, 1874.

DAVID K. CRAIG,)
 vs.)
 WILLIAM K. SMITH.) *In Case.*

After hearing the argument of the counsel, the above case being tried before the Court, the Court rendered a verdict in favor of the Defendant, whereupon the Court order judgment accordingly in favor of the said defendant, and against the said plaintiff. 10

Therefore it is considered that the said defendant do recover against the said plaintiff the sum of
 dollars and cents for
 his costs and charges now here adjudged to him, and the said David K. Craig in mercy, &c.

SOMERSET CIRCUIT COURT.

DAVID K. CRAIG,)
 vs.)
 WILLIAM K. SMITH.) *In Case.*
)
) *Statement of Case*

This action was brought in pursuance of *Section 3*, of 20 the Mechanic's Lien Act, and *Section 2* of the Supplement of 1863 thereto. Nix. Dig, 572 and 581.

The defendant had contracted with one Asa R. Dilts, as master builder and contractor, to erect and furnish for him a dwelling house in Somerville, New Jersey. By this agreement, which was in writing and filed according to law the contractor was to furnish all the materials and do all the work needed in the erection and completion of said dwelling house.

The plaintiff was a merchant living in Somerville, who furnished slates, chimneys, &c., for roofing buildings, &c., and who also placed and fastened them on such buildings; with him the contractor, Asa R. Dilts, bargained to put the slate roof, three chimneys, &c., (*pro ut* the bill annexed to the declaration) on the said dwelling house so to be built and erected by said contractor for said defendant, which work was done, and the materials therefore furnished by the plaintiff on the eleventh day of August, 1873.

- 10 The reasonable price for the work so done, and the materials furnished by the plaintiff for said dwelling house of the defendant, is the sum of one hundred and ninety-five 72-100 dollars.

After said materials had been furnished and work done as aforesaid, the plaintiff demanded the pay for the same of the said contractor, Asa R. Dilts, who however refused to pay him therefor, whereupon the plaintiff on the tenth day of September 1873, notified the defendant to retain the amount of said bill out of the amount owing by him to said contractor. Prior to the service of this notice, how-
20 ever, and on the ninth day of September, 1873, the said contractor, Asa R. Dilts, had made an assignment of all his estate, both real and personal, to Hugh M. Gaston, for the benefit of his creditors, according of an act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors, and the supplements thereto. Nix. Dig., page 32.

30 The defendant had in his hands at the time of said assignment, and at the time of the service of said notice by the plaintiff, over two hundred dollars owing by him to the said Asa R. Dilts, on account of the erection of said dwelling house, and has not since paid the same to any one; and furthermore is satisfied of the correctness of the p'aintiff's claim.

If judgment be rendered for the plaintiff, it is agreed that it be for one hundred and ninety-five 72-100 dollars, and that either party have the privilege of considering this statement a special verdict, or a special case stated for the purpose of bringing a writ of error thereon.

I. N. DILTS,
Att'y for Pl'ff.

GASTON & BERGEN,
Att'ys for Def't.

Dated January 16, 1874.

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The record and proceedings whereof mention is within made, with all things touching and concerning the same, I do transmit to the Judges of the Court of Errors and Appeals in the last resort in all causes, at the day and place within named, in a certain schedule and record to this writ annexed, as by the within writ it is commanded.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this fifteenth day of June, A. D. eighteen hundred and seventy-four.

[L. S.]

By order of the Court,
WILLIAM ROSS, JR., Clerk.

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(A true copy,
HENRY C. KELSEY, Clerk.

Afterwards, to wit, on the sixteenth day of June, in the year of our Lord one thousand eight hundred and seventy-four, before the judges of the Court of Errors and Appeals of the State of New Jersey, comes the said David K. Craig, the plaintiff in error, by Isaiah N. Dilts, his Attorney, and says that in the record and proceedings aforesaid, and in giving judgment aforesaid, there is manifest error in

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this, that the judgment aforesaid by the record aforesaid appears to have been given for the said William K. Smith, against the said David K. Craig, whereas by the law of the land the said judgment ought to have been given for the said David K. Craig against the said William K. Smith ; and also there is error in this, that the said Court in giving said judgment determined that the said plaintiff, David K. Craig, was not entitled to the money belonging to said master builder, or contractor, remaining in the hands of the

10 said William K. Smith, because the said master builder or contractor had made an assignment of his estate, real and personal, under the act entitled "An act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," before the service of notice by the said David K. Craig on the said William K. Smith, although said money was yet, at the service of said notice, remaining in the hands of said William K. Smith ; whereas by the law of the land the said David K. Craig was entitled to said money ; and the

20 said David K. Craig prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being may be reversed, annulled and altogether holden for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

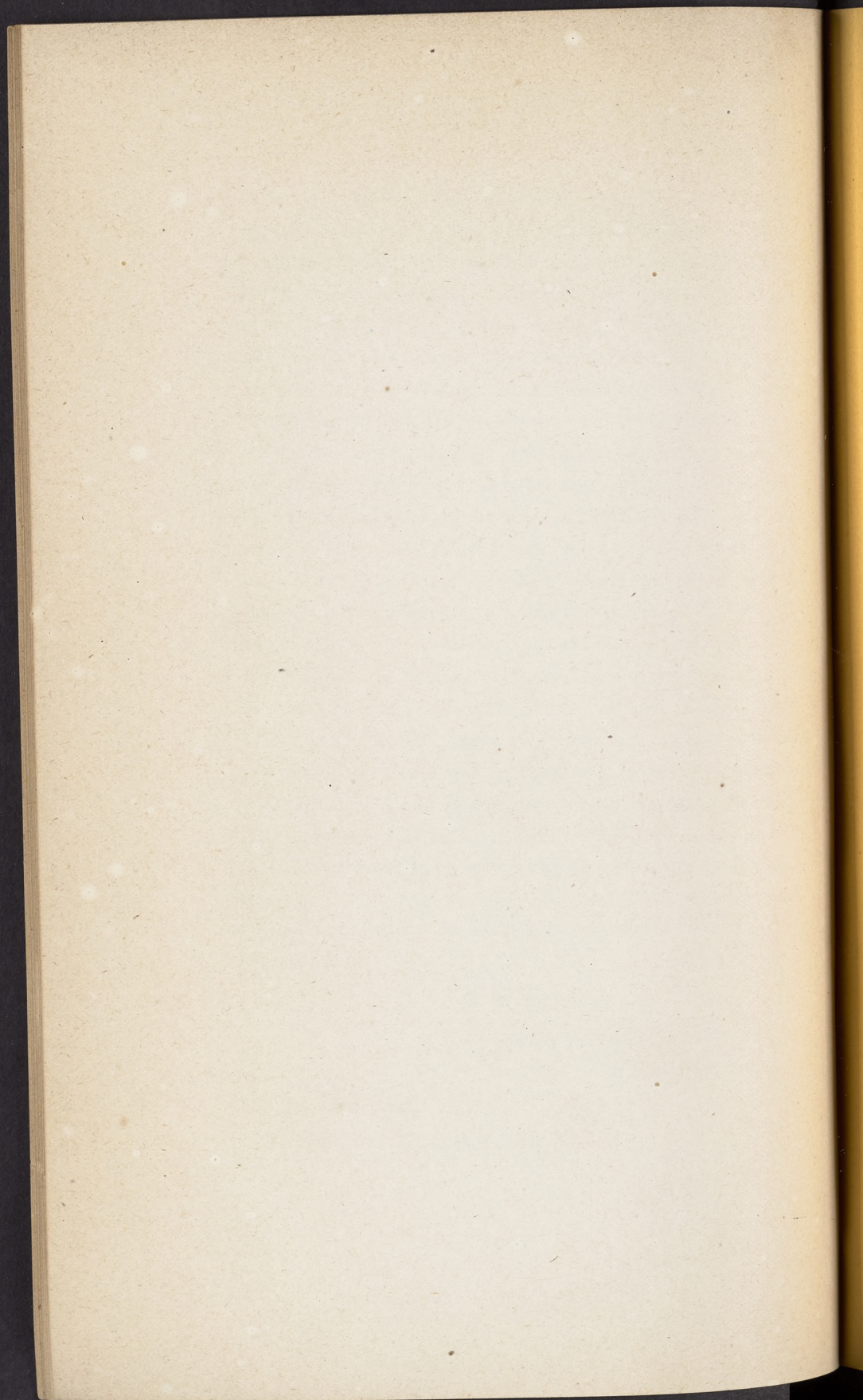
I. N. DILTS,

Attorney and of Counsel with
Plaintiff in Error.

(A true copy,)

HENRY C. KELSEY, Clerk.

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