Walkenhorst, Frederick v. Coste, Felix et al 1863 493/3

624/2 33/401

Colman (A)

RF Wingate (R)

Walkenhorst (P)(R)

v

Anthony M. Foster

Barnett, George

Webber, Mahlon

Coste (D)(A)

enforcement

Mechanics Lien

St Ho

March 1863

March 1860

Costs owned building . parnet & webs to erect it.

Foster was to do brick wk - Brick - Walkenhorst

- balance due for 7 hundred brick only one owned by Coste

- general judgement must be reversed.

Reversed & remanded Butt

1. State of Missouri
County of St. Louis } ss

Be it remembered, that on the 5th day of January 1858, there was filed in the Clerks Office of the Law Commissioner's Court of St. Louis County, State aforesaid a petition in words and figures following, to wit:

Frederick Walkenhorst, plaintiff
against
Felix Coste, Anthony M. Foster & George J. Barnett and Mahlon Webber, partners by the name and style of Barnett & Webber, Defendants } In the Law Commissioners Court of St. Louis County in the State of Missouri

Feb. Term 1858.

Plaintiffs state that the said Felix Coste one of the defendants herein is the owner in fee simple of the following described lot or parcel of ground, to wit: Lot Number 12, in Block number 7, between Market and Walnut Streets in the City of St. Louis and State of Missouri, the same being twenty one feet and eight and three forths of an inch wide, and fronts on the Levee and Commercial Streets and eighty feet and six and three forths of an inch deep. Upon which said lot said Felix Coste has erected or caused to be erected a certain brick building, the same being Number 12, situated

2. on said Lot number 12, and fronts the Levee on the East and Commercial Streets on the West and is one of a row of brick buildings, commonly called the City Buildings, situated on said Block Number 7 between Market and Walnut Streets in the said City and County of St. Louis and State of Missouri

The plaintiff further states that the said George J. Barnett and Mahlon Webber, partners were the original contractors for the furnishing of the materials and erecting and completing said building and that the said defendant Anthony M. Foster was a sub. contractor under said Barnett and Webber for the furnishing and laying all the brick work of said building under an agreement to that effect made by the said Foster with the said Barnett and Webber, partners as aforesaid, and that to enable the said Anthony M. Foster to comply with his said contract with the said Barnett and Webber he the said Foster purchased of said plaintiff, brick material as follows: that is to say 5.790 merchantable brick at and for which he agreed to pay the plaintiff $7.85 per thousand, making the sum of $45.45, Also 1.124 Stock brick at and for which he agreed to pay the plaintiff $15.00 per thousand and making the sum of $16.81 all of which said brick was delivered by the plaintiff to the said defendant Foster and used by him in the erection of said building (as.

3. specified in plff's account filed as a lien upon said property) whereby and on account thereof said Defendant Foster became justly indebted to said plff. in the aggregate sum of $62.33 all of which sum of $62.33 still remains due and owing to the plff. no part thereof having been paid.

Plaintiff states further that on the 14th day of November A.D. 1857 and within four months after the said indebtedness accrued (in accordance with and in pursuance of the 3d Section of a Special Act of the General Assembly of the State of Missouri approved February 14th 1857 entitled an Act "For the better Security of Mechanics and others erecting buildings or furnishing materials for the same in the County of St. Louis"] he filed with the Clerk of the St. Louis Land Court a just and true account of the said demand so due him as aforesaid, after all just credits having been given on the same, there being in fact no credits on the same no part thereof having been paid, and that at the time of filing said account as aforesaid he accompanied the same by filing therewith a true description of the said property or so near a true description thereof as to identify the same and also at the same time accompanied and filed with said account and description of said property the name of said Felix Coste the owner of said property and the

4. names of the said contractors and sub-contractor above stated, all of which said plaintiff, verified by his oath as required by said Section of said Act.

Plaintiff further States that ten days before he filed his lien upon said property as herein above stated, he gave and caused to be served on the said Felix Coste owner of the said property, a notice in writing in which it was set forth and specified, that he the plaintiff held a claim against said building for the said sum of $62.33 and that the same was due from the said sub contractor Anthony W. Foster, in accordance with, in pursuance of, and as required by the 18th Section of said Act and in all other respects complied with the provisions of the said Act of the General assembly of the State of Missouri, in order that he said pltff. might avail himself of the benefit of said Act, and retain a Lien upon said Property to enforce the Payment of the indebtedness to him for the materials furnished for said building as aforesaid. Therefore and in consideration of the premises the pltff. prays Judgment against the said Defendants for the sum of $62.33 aforesaid & his costs and that the Same may be levied out of the said property of the said Felix Coste above described unless sufficient property of said Anthony W. Foster may be found

5. to satisfy such Judgment, or unless otherwise paid.

R. F. Wingate

Atty for pltff.

Frederick Walkenhorst plaintiff upon his oath says that the above petition and the matters and things as therein stated are true, as he verily believes.

Fritz Walkenhorst

Sworn to and subscribed before me this 2d day of January AD. 1858.

Chas. P. Johnson, Notary Public.

And afterwards, to wit: on the 5th day of January 1858 the following summons was issued to wit:

The State of Missouri

To the Marshal of St. Louis County, Greeting

We command you to summon Felix Coste, Anthony M. Foster and George J. Parnett and Mahlon Webber partners under name and style of Parnett & Webber to appear before the Law Commissioner's Court of St. Louis County on the first day of the next term thereof, to be held at the City of St. Louis, within and for the County of St. Louis, on the first Monday of February next, then and there to answer the complaint of Frederick Walkenhorst as set forth in the annexed petition, and have you then and there this writ.

Witness Warren Montfort Clerk of the Law Commissioners Court of St. Louis County,

with the seal of said Court hereto affixed, at office, in the City of St. Louis, this 5th day of January in the year of our Lord One thousand eight hundred and fifty eight.

(Seal)

W. Montfort Clerk

The Return of the Marshal endorsed on said writ is as follows:

"Executed this writ in St. Louis County January 15th 1858 by delivering a true copy of the same together with the petition thereof to Felix Coste and further executed by delivering a true copy of the writ to A. M. Foster, George J. Barnett and Mahlon Webber

Fees $4.

Wm C Smith
Marshal

And afterwards on the 6th day of February 1858 the following proceedings were had:

J. Walkenhost vs Felix Coste et al. } On motion of Defendants A. M. Foster &c by their attorney they have time until the 13th February 1858 to answer herein.

And afterwards, to wit: on the 13th day of February 1858 Defendants file a Demurrer to the petition of plaintiffs as follows:

Demurrer

7. Frederick Walkenhorst
against
Felix Coste, George J. Barnett & Mahlon Weber
impleaded with Anthony W. Foster

In the Law Commissioners Court of St. Louis County February Term 1858.

The said Defendants above named come and demur to the petition of the plaintiff and for causes of Demurrer specify the following, viz:

1st. That there is a defect of parties defendant, in this, that George J. Barnett & Mahlon Weber, are improperly joined as parties defendant in the action.

2d. That George J. Barnett and Mahlon Weber Parties Defendant are not necessary parties to a complete determination of the action.

3d. That the said George J. Barnett & Mahlon Weber are not, nor is either of them parties to any contract with the plaintiff, or in any manner connected with or liable upon any contract with the plaintiff, nor are they or either of them interested in the controversy, or in the property charged with the lien in the action or otherwise.

Bland and Coleman
Attys for said Defts.

And afterwards, to wit: on the 15th day of February 1858 the answer of A. M. Foster was filed as follows.

Frederick Walkenhorst pltff
vs
Anthony M. Foster, Felix Coste et als. Defts

Law Commissioner's Court St. Louis Co.
Feb. Term. 1858.

Anthony M. Foster defendant answering denies, that he purchased & received of Plff the amount of brick specified in Plff's petition in the manner and for the purpose therein stated, and denies that he owes the Plff. the sum therein specified or any sum for any brick purchased of Sd Plff.

Defendant admits that he was subcontractor under said Barnett and Webber for putting up seven stores or buildings, called the City Buildings being the same referred to in Plff's petition and has reason to believe & does believe that the said Coste was & is the owner of one of said stores as alleged in Plff's petition. This Defendant says farther, that between the 1st day of May & the first day of August 1847 Sd Plff delivered to this Deft. at Sd City Buildings about one hundred and fifty thousand hard & red brick & about ten thousand stock brick, according to this Defts best knowledge and belief, for which this Deft was to pay the price alleged in Plff's petition and that Sd brick were used by Deft in some or all of Sd Seven stores or buildings. That Sd Brick were delivered as aforesaid in pursuance of an agreement made between Plff & this Deft. & said Barnett & Webber, which Sd agreement was that this defendant should draw orders on Sd Barnett & Webber from time to time for the

9. amount of brick then delivered & that sd Pltff should receive sd orders in payment for sd brick, sd Barnett & Webber, then & there agreeing to accept & pay the same.

That in pursuance of sd agreement this Deft. drew orders from time to time on sd Barnett & Webber in favor of sd Pltff. & delivered the same to Pltff., which orders were accepted & paid by Barnett & Webber to the amount of eight hundred and ninety two dollars & sixty cents, according to the Defts. best knowledge & belief. That on or about the first day of August 1857 this Deft. drew his order on sd Barnett & Webber at Pltffs request & in his favor for the sum of four hundred & thirty seven $\frac{85}{100}$ dollars which order was for the full balance then due Pltff. by this Deft. for all the brick this Deft. has ever received of Pltff. none having been delivered him by Pltff. since the date of sd last named order.

That at the date of sd order sd Barnett & Webber were indebted to this Deft. in a sum much larger than the amount of sd order & so continued till after the commencement of this suit & are still so indebted, as this Deft. believes.

That sd Pltff. received sd order on the day of its date & still retains the same & did not give this Deft. legal or reasonable notice that the same was not paid —

This Deft. avers that six suits are now pending

10. in this Court, brought by sd Plff. against this Deft. & others, all for the same cause of action, this & four of the other suits being each for one seventh & the other suit being for two sevenths parts of the amount of said order & of the amount of the same bricks for which sd order was given & received in payment. That all of sd Suits are between the same parties, except that only one owner of the land upon which sd buildings were erected is made codefendant in any one suit. This Deft. avers that he made but one contract with sd Plff. & that Plff. has but one cause of action against him, if any & that, that cause if any there is exceeds the jurisdiction of this Court & that this Deft. ought not to be held liable in six several suits for the same cause. This Deft avers that while building sd buildings he purchased & received bricks from a great many persons & used them in sd buildings, that his business called him away from sd buildings much of his time. & that he has not any knowledge or information sufficient to form a belief as to whether or not the brick specified in the petition in this Suit, were used by him in the store or building therein alleged to be the property of sd Coste.

As to the other matters alleged in sd Plff's petition not herein denied or admitted & especially as

11. to all matters & things alleged by Plff whereby he claims the right to a lien on the land & building specified in his petition. Deft says that he has not sufficient knowledge or information thereof to form a belief and calls for proof.

Anthony M Foster, Defendant makes oath & says that the above answer & the matters therein as stated, he believes to be true.

Anthony M. Foster

Subscribed & Sworn to before me Feby 15th 1858.

M Montfort C

And afterwards, to wit: on the 20th day of February 1858 the following proceedings were had:

Fred. Walkenhorst vs Felix Coste et al } The Court having heard and being now fully advised of and concerning the Demurrer to the petition herein doth overrule the said demurrer.

And afterwards to wit: on the 25th day of February 1858 The Court grants time to the 6th day of March to answer.

And afterwards, March 6th 1858 on motion Defendants are allowed until first day of next term to answer herein & cases continued

12. and afterwards, April 2° 1858, the answer of Felix Coste impleaded with George J. Barnett & Mahlon Webber & others was filed.

Which said answer is as follows:

Frederick Walkenhorst
vs
Felix Coste impleaded with George J. Barnett and Mahlon Weber & others

In the Law Commissioners Court of St. Louis County.

February Term 1858.

The Defendants Felix Coste, impleaded &c. for answer to the petition of the plaintiff says that, he denies that he is the owner, in fee simple of the property described in said petition, and alleges that the same belonged to him and one Robert Barth; jointly and also that he has no knowledge or information sufficient to form a belief as to whether Anthony W. Foster, was a sub contractor under said Barnett & Weber for the furnishing and laying of all the brick work of said building or any part thereof under an agreement made by said Foster with the said Barnett & Weber as partners, or otherwise. Nor has he any knowledge or information sufficient to form a belief whether or not the said plaintiff to enable said Foster to comply with his contract with said Barnett & Weber sold & delivered to said Foster, or said Foster purchased of Plaintiff brick material

13. that is to say 5790 merchantable brick, for which he agreed to pay said Plaintiff $7.85 per thousand or any other sum; or 1124 Stock brick at $15 per thousand or any other sum, or any other quantity of either kinds of said brick or any other brick materials; or that any such brick, or any other kind were delivered to said Foster by said Plaintiff, or used by said Foster, in the erection of said building (as specified in the Plaintiff's account filed as a lien upon said property) or in any other manner, whereby or on account of which said Foster became justly indebted to said Plaintiff in the sum of $62.33 or any other sum, or that said sum or any other sum still remains due & owing plaintiff; nor has the Defendant any knowledge or information sufficient to form a belief whether the said Plaintiff on the 14th day of November 1857, or at any other time, and within four months after the said alleged indebtedness accrued, or at any other time (in accordance with or in pursuance of the 3d Section of a Special Act of the General Assembly of the State of Missouri entitled, An Act for the better security of Mechanics and others erecting buildings or furnishing materials for the same in the County of St Louis or of any other provision of law, filed with the Clerk of the St Louis Land Court a just and true account of the said demand so due him

14 as aforesaid after all just credits given, or in any other manner, or that any description of the property, or of the names of the owners, contractors or otherwise, was filed or that any such statement was verified by the affidavit of the Plaintiff or in any other manner; or whether ten days prior to the alleged filing of said statement, the said Plaintiff gave and caused to be given or served on the Defendant a notice in writing as alleged in said Petition (although he admits a notice of some kind was served upon him at some time) and of all which matters and things the Defendant will require strict and proper proof on the trial of this action.

And the said Defendant for a further answer in this behalf states & shows unto the Court that on or about the 20th day of January A.D. 1857, & prior to the 14th day of February 1857, this Defendant & the said Robert Barth said joint owner entend into a contract in writing with the said George S. Barnett and Mahlon Weber for the erection & completion of said building, whereby said Barnett & Weber undertook and agreed to erect, build, set up and deliver in a good substantial and workmanlike manner the said building No. 12 in said Block, they to furnish at their own proper cost & charges all the materials & workmanship necessary for

15. the construction thereof, according to certain plans & specifications mentioned & referred to in said agreement, and to do said work under the inspection & direction of certain Architects & Superintendants therein also named, using in the said building all such old materials as should be approved by said Architects & Superintendents & allow the price therefor, specified in their estimates for the same, for the sum of ten thousand two hundred and seventy four $\frac{50}{100}$ dollars, the said Defendant & said Barth, promising to pay such amount in instalments, in the manner specified in said agreement, all of which was duly made by them, according to the terms of said contract; that said building was erected by said Barnett & Weber under said agreement & not under or by virtue of any other or subsequent arrangement; that said contract between said Barnett & Weber & the said Defendant & said Barth was made & entered into prior to the passage of the Special act of the General Assembly mentioned & referred to in said petition; that the said Plaintiff never at any time prior to, or at the time of the alleged furnishing of said brick, gave notice to him or to their agent or trustee of his intention to furnish the same or any part thereof, or the probable value of the same; nor did he make any settlement with

16. the contractors thereof, or present any settlement certified by them to be just to this Defendant or said Barth, or either of them; nor did said Plaintiff within thirty days from the time of the alleged furnishing of said brick file any copy of settlement between him & said contractors, or comply with any of the provisions of an Act of the General Assembly of the State of Missouri entitled "An Act securing Liens to Mechanics and others" approved December 11. 1855, which said Act was in full force and effect at the time of the making of said contract; and this Defendant will upon the trial of this action, claim & insist and hereby does claim & insist, that the rights, duties, obligations & liabilities of this Defendant & said Barth in the premises, as also those of the Plaintiff are to be governed, determined & controlled by the Law as the same existed at the time of the making of said contract, & not otherwise; And that the said Act of the General Assembly of the 14th of February 1857, so far as the same may purport to affect, enlarge or vary the rights, duties, obligations or liabilities of this Defendant or said Barth or of their said property is unconstitutional and void as being an ex post facto law, and as being retrospective in its operation and a law impairing the obligation of contracts, and the contract of this

17. Defendant & said Barth so made, between them & said Barnett & Weber in relation to the erection of said building as aforesaid to the same extent and with the same effect as if such several facts as herein before set forth appeared upon from the Petition of said Plaintiff he had demurred thereto. Bland & Coleman

Defts Attys

County of St. Louis ss.

Charles D. Coleman being duly sworn says, that he believes the foregoing answer and the matters therein as stated to be true, and that he is one of the Attorneys of Defendants.

Sworn this 2. day of April 1858 before me. Chas D. Coleman

A. Montfort C

And afterwards, on the 15th day of June 1858 the Case was continued.

And afterwards, on the 13th day of August 1858 the said cause was again continued.

And afterwards, on the 17th day of March 1859 the said case was continued generally.

And afterwards, on the 21st day of April 1859, by consent of parties this case continued generally.

And afterwards, on the 15th day of June 1859,

this case was continued generally by consent. And afterwards on the 8th day of August 1859, the case was continued generally at plaintiff costs.

And afterwards, to wit: on the 5th day of October 1859 the following proceedings were had:

Frederick Walkenhorst vs Felix Coste, Anthony M. Foster & George A. Barnett and Mahlon Webber partners by name of Barnett and Webber

This day comes the plaintiff by his attorney and the defendant Foster, but the Defendant Felix Coste although solemnly called, fails to appear and the Defendants Barnett & Webber having failed to answer or plead further herein, and not now appearing although duly called. It is on motion of Plaintiff's Attorney considered by the Court that the petition of plaintiff as to said Defendants Barnett & Webber be taken as confessed and this case being called for Trial, and the plaintiff and the Defendant Foster being ready for trial waiving a Jury submit this case to the Court, and the Court having heard the evidence and being not fully advised of the premises take time to consider thereof.

And afterwards to wit: on the 8th day of November

19. 1859 Judgment was given against all the Defendants, as follows:

Frederick Walkenhorst
vs
Felix Coste, Anthony M. Foster, George J. Barnett & Mahlon Webber

This day the Court having considered the evidence and proofs herein and being fully advised of the premises doth find that the Defendants are indebted to the Plaintiff in the sum of Sixty Nine Dollars and fifteen cents. It is therefore considered and adjudged by the Court that the Plaintiff recover of the Defendants the sum aforesaid in form aforesaid by the Court found and his costs herein expended and thereof have execution and it appearing to the Court that this is an action upon a Mechanics Lien it is further considered and adjudged by the Court, that if no sufficient property of the Defendants be found to satisfy the Judgment herein the same shall be levied out of the property chargeable with the lien herein, viz: A certain brick building the same being number 12, situated in Lot number 12 in Block Number 4 and fronts the Levee on the East and Commercial Street on the West and is one of a row of brick buildings commonly called the City Buildings, situated in said block Number 4, between Market & Walnut

Streets in the City and County of St. Louis" and it is further ordered by the Court that a transcript of this Judgment and the proceedings herein be filed in the Office of the Clerk of the St. Louis Land Court

And afterwards, on the 10th day of November 1859 Defendants file a motion for a New Trial, as follows:

Frederick Walkenhorst vs Felix Coste & others — In Law Com'ns Court Oct. Term 1859.

And now at this day come the Defendants Felix Coste, George I. Barnett and Mahlon Weber and move the Court to set aside the Judgment and grant them a New Trial herein for the following among other reasons, viz:

1st Because the evidence given on the Trial was insufficient to authorize a Judgment in favor of the Plaintiff in the action.

2° Because there is no allegation in the pleadings, or any evidence given on the Trial to authorize any general Judgment in the action against the Defendant Coste, Barnett & Weber or either of them.

3° Because the Judgment is general against all of the Defendants, as well as special against the property.

4th Because the Court improperly refused

21 instructions and declarations of law asked by Defendants.

5th. Because the Judgment is contrary to law and evidence and unsupported by either.

And said Defendants also move in arrest of Judgment for the reasons stated in the 2d & 3d Reasons for New Trial as above set forth.

Nov. 18th 1859.

Bland & Coleman
Attys for said Defts.

And afterwards to wit, on the 24th December 1859 the following proceedings in relation to said motion were had:

Frederick Walkenhorst vs Felix Coste & others } This day come the parties by their attorneys and having argued submit the motion for a New Trial herein to the Court and the Court not being fully advised of the said motion takes time to consider thereof.

And afterwards, to wit: on the 14th day of January 1860, said motion was overruled as follows:

Frederick Walkenhorst vs Felix Coste & others } This day the Court having considered the motion for a New Trial herein and being fully

 advised thereof overrules the said motion

And afterwards, to wit: on the 20th day of January 1860 the following Proceedings were had:

Frederick Walkenhorst.
vs
Felix Coste, Anthony M. Foster, George D. Barnett and Mahlon Webber partners by the name & style of Barnett Webber

This day comes the Defendant Mahlon Webber and files his bill of Exceptions and prays an appeal to the Supreme Court and also files his appeal bond with himself as principal and Charles D. Coleman and David Naylor as Sureties which Bond being approved by the Court said appeal is granted.

Said Bill of Exceptions is as follows, to wit:

Frederick Walkenhorst
vs
Felix Coste, George D. Barnett & Mahlon Weber, impleaded with Anthony M. Foster

In the Law Commissioner's Court of St. Louis County
Dec. Term AD. 1859

Be it remembered that on the 5th day of October 1859, said cause came on for trial, none of the Defendants being present either by themselves

23 or attorney except said Anthony M. Foster who appeared in his own behalf, and that by agreement of the parties in Court, a Jury was waived, and said cause was submitted to the Court for Trial. Whereupon the pltff. called the Deft. Anthony M Foster as a witness who after being duly sworn testified. That he was acquainted with all of the parties in said suit & that he was also acquainted with the house No. 12 & the ground upon which the same is situated in the Pltff's petition mentioned, that he furnished the material and done the brick work of said building as a sub contractor under said Barnett & Weber, who were the original contractors for furnishing the material and erection of said house for the said deft.

That he witness was also a sub contractor under said Barnett & Weber for furnishing the material & doing the brick work of six other buildings belonging to other persons and which together with said house No 12, form a part of what is commonly known as the City buildings, that there are thirteen of said City buildings seven of which he furnished the material for, and done the brick work of: that said houses were very nearly of the same size, and all built up together, and at the same time. That the pltff under a contract with him

24. furnished brick ~~work~~ for said house No. 12. as also for all the said houses, of which he, witness, done the brick work, That he witness agreed to give the Plff. 7^{85} per thousand for the brick so delivered at said houses by the Plff. and that there remains due and unpaid to the Plff. for and on account of brick material delivered at said buildings so done by ~~the~~ the sum of $437 $^{35}/_{100}$ one seventh of which amount being some $62.47 is due the Plff. for brick furnished to said house No. 12, if as many brick were delivered at said house No as to the rest of said houses respectively, he could not state the particular amount of the brick furnished by the Plff. used in each house, they were all used in the said seven buildings, but that he believed and was satisfied that a part of said brick were used in the erection of each of said seven buildings, the brick furnished by Plff. were deposited opposite each of the said seven houses, as they were wanted as the work progressed & if delivered regularly they were used in about equal proportions in each of said buildings — that said buildings belonged to separate owners, that the Plff delivered his last brick at said house No. 12 about the last day of July 1857.

The Plff. also called Henry Aulmann

25. as a witness who being duly sworn testified as follows: I know the Plff. I was employed by the plff. as his teamster in July A.D. 1857. I hauled brick for the plff. as his driver to the City buildings I know the said house No. 12 in the row of what is commonly called the City buildings, in the City and County of St. Louis State of Missouri, and as the plff's driver delivered brick for him to & at said house No. 12. as also to the other said buildings, built by said Anthony W. Foster, the brick were delivered regularly and deposited opposite to each of said houses. Cant say the exact number of brick delivered at each of said seven houses but think and believe each of said seven houses got an equal proportion of the brick delivered by plff. to said buildings. I believe I delivered the last on the last day of July A.D. 1857.

The plff. then called C. P. Walsh as a witness, who after being duly sworn testified as follows. I am a Deputy Clerk of the St. Louis Land Court of St. Louis County and that the paper now here produced by me is the original lien filed by the plff. in the Clerks Office of the St. Louis Land Court of St. Louis County and that the same was filed in said Clerks Office, as the endorsement

or file mark thereon imports, which paper was then read in evidence by the Pltff. as also the file mark thereon endorsed and are as follows:

Lien

Anthony M. Foster To

Frederick Walkenhorst Dr.

To the following materials furnished for a certain brick building the same being number twelve, and one of a row of buildings commonly called the City buildings, fronting on the Levee, and situated on Lot number Twelve (12) in Block Number Seven between Market & Walnut Streets in the City and County of St. Louis and State of Missouri

1857

July 14	To 1000	Merchantable brick at $7.85 Per Thousand	$7.85
" 15	" 800	" " "	6.28
" 17	" 800	" " "	6.28
" 20th	" 800	" " "	6.28
" 21st	" 800	" " "	6.28
" 25th	" 590	" " "	4.70
" 29th	" 1000	" " "	7.85
" 30th	" 500	Stock Brick at $15. "	7.50
Augt 1st	" 624	" " "	9.31
		Total	$ 62.33

State of Missouri
County of St. Louis } ss. Frederick Walkenhorst being duly sworn on his oath states, that the

27 above and foregoing is a just and true account of the demand justly due him by the aforesaid Anthony W. Foster amounting to sixty two Dollars and thirty three cents, after giving all just credits on the same (there being in fact no credits on the same, no part thereof having been paid) and is for materials furnished by this affiant to the said Anthony W. Foster for "a certain brick building, the same being number twelve fronting the Levee on the East and Commercial Street on the West and being one of a row of brick buildings commonly called the City Buildings, and situated on Lot number twelve, in Block Number Seven, between Market and Walnut Streets in the City of St. Louis" And that the said building, as also the ground upon which the same is situated was and is owned and belongs to Felix Coste, the said ground being described as follows: to wit: Lot Number twelve in Block number seven situate between Market and Walnut Streets of the City of St. Louis, the same being twenty one feet and (8) eight and three fourths of an inch wide and eighty feet and six and three fourths of an inch deep, fronting the Levee on the East and Commercial Street on the West in the City and County of St. Louis and State of Missouri. That the said Foster was, and said materials were

furnished to him as a sub-contractor under Messrs George J Barnett and Mahlon Weber the Contractors for the building, and erection of the said building, for said building. And affiant further states, that the said owner of said building and ground has been duly notified of this affiants claim against said building and his intention to file a lien against said building and ground in pursuance of an Act of the Legislature of the State of Missouri approved February 14th 1857 entitled "an Act for the better Security of Mechanics and others erecting buildings or furnishing materials for the same in the County of St. Louis which said Notice was duly served on the said Felix Coste on the 26th day of October 1857, which said Notice a copy of which was served upon the said Felix Coste is hereto attached.

Sworn to & Subscribed before me this 14th day of November 1857. — Fritz Wilkenhorst

Chas A Mantz Clerk

Endorsed on the back of said Lien is the file mark as follows:

Filed November 14th 1857.

C. A. Mantz. Clk

The Notice attached to said Lien is as follows:

To Felix Coste

29

Sir, You will please take notice that I hold a claim against a certain brick building, the said building being number twelve and being a part of a row of buildings commonly called the City Buildings, fronting on the Levee and situated between Market & Walnut Sts in the City & County of St. Louis & State of Missouri owned by you, which claim amounts to the sum of Sixty two dollars & thirty three cents, and which sum is due now Anthony N. Foster for brick furnished and delivered at said building by me under an agreement between the said Foster and myself.

St. Louis Mo. Oct. 14th 1857 } Frederick Walkenhorst

The service is indorsed as follows:
Executed this Notice in the County of St. Louis, on the 26th day of October 1857 by delivering to the within named Felix Coste a copy of the same as furnished
Fee 50 cents paid } James Castello Shff.
Attorney Wingate by N. Berg. Dpt.

The plff. then offered & read in evidence a written notice to the said Felix Coste as the owner of said house of his plff's claim against the said house No. 12 which was which was in the words and figures as above given in this

The evidence in the action here closed and the foregoing is the substance of all the evidence given on said trial & is a full and true statement of all the evidence given on said Trial. Whereupon said cause was submitted to the Court by the Plff. & said Foster and after it was so submitted Chas. D. Coleman counsel for said defts Barnett Weber and Coste came into Court, and asked leave of the Court to argue said cause, which was granted by the Court and that when said counsel, came afterwards to argue said cause, he offered no argument but asked the Court for leave to ask instructions, to which the Plff. by his counsel objected for the reason that the Defts had no right to ask instructions, after the cause had been submitted by the Plff. which objection the Court overruled, to which ruling of the Court the Plff. then and there duly excepted.

Whereupon the Defts asked the Court to give the following Instructions viz:

1. If the Court sitting as a Jury shall believe from the evidence in the case that the plaintiff delivered to Anthony W. Foster, as a sub-contractor for the building of the building in

31. this case and also for the building of six other buildings in the same row; that five of said buildings belonged to different owners, and the remaining two buildings were owned by another person; that such brick were delivered to said Foster by the Plaintiff under one entire contract and that the sum of $437 35/100 remained due to said Plaintiff from said Foster for the brick so delivered; that the said Foster made and delivered to the Plaintiff and the Plaintiff accepted and received the order of said Foster for the full amount, upon settlement, after the brick were delivered then the Plaintiff cannot divide up the amount, so as to give this court jurisdiction, and the Plaintiff cannot recover in the action.

Refused

2. If the Court sitting as a Jury shall find from the evidence in the case, that the said Plaintiff furnished Anthony M. Foster a large quantity of brick for the construction of seven buildings known as part of the "City buildings" that said Foster was a subcontractor for the doing of the brick work for said seven buildings; that two of said buildings were owned by James N. Lucas, and that each of the others were respectively owned by Felix Coste, Edward Hazen, George Johnson, Joseph J. Clark and Robert Campbell, or that all of said buildings

were owned by different persons, only that two of said buildings were owned by one of such persons; that such brick were delivered by the Plaintiff and received by said Foster under a contract for the delivery thereof for the construction of all of said buildings, and were used by said Foster indiscriminately in the erection of said seven buildings; that after said brick were all delivered, a settlement & accounting of the quantity delivered, was had between said Plaintiff & said Foster, and said Foster gave the plaintiff and the Plaintiff received the order of said Foster upon Barnett & Weber or any other person or persons for the amount and value thereof; that such amount was Four hundred and thirty seven $\frac{35}{100}$ Dollars, then the Plaintiff has no lien against the separate pieces of property or buildings and the Plaintiff cannot have Judgment for the enforcement thereof against the same.

Refused

3° Unless the Court shall find from the evidence in the case that the brick in question were delivered by the Plaintiff for the construction or erection of the particular building in question, or were used in the erection thereof; that such brick were delivered upon a contract made and entered into after the 14th day of Febru

33.

ary A.D. 1857, that the brick for which this lien is sought were not delivered in common and indiscriminately with other brick for other buildings then in course of erection; that such brick for this particular building were so delivered under a separate & distinct contract therefor as distinguished from a general and entire contract for all of said seven buildings, then the Plaintiff is not entitled to any lien against the building or property in question, or to any Judgment for enforcement thereof.

Refused

4th If the Court shall find from the evidence that Plaintiff delivered Defendant Foster brick to the amount & value of $437 35/100; that such brick were delivered & received under an entire contract between Plaintiff & Foster; that the brick thus delivered & received were and are a part of those from which this alleged lien is sought to be enforced; that the demand in favor of the Plaintiff & against said Foster, was and is entire for the whole sum of $437 35/100 then the Plaintiff cannot divide said claim so as to bring separate actions against said Foster and is not entitled to recover in the action.

Refused

5th That upon the record & evidence in the case the Plaintiff is not entitled to recover in the action or to the enforcement of any lien therein

Refused

6th That unless the Court shall find that the brick in question were delivered to and for, or were used in the erection of the building in question, then the Plaintiff cannot recover against any of the Defendants other than Foster or have or enforce any lien against the property in question

Given

7th That if the Court sitting as a Jury shall find from the evidence that the Plaintiff delivered to said Foster a large quantity of brick for the erection of seven of the block of buildings, known as the "City Buildings"; that such brick were delivered to & were used in the erection of said seven buildings, indiscriminately, that such seven buildings were not owned by the same person or persons; that the amount & value of said brick was over four hundred Dollars, That the Plaintiff is not entitled to any separate lien against either or any of said buildings, or for the enforcement of any such lien in this Court, and that this Court has no Jurisdiction in the case for the enforcement of any such lien, upon the Record & evidence in the case.

Refused

All of which said foregoing instructions the Court refused to give except the Sixth one, which the Court granted, to which refusal

35. of the Court to give the others, the said Defts. then and there duly excepted.

The Court thereupon rendered Judgment in favor of the Plff and against the Defts. And the Defts. afterwards & within four days after the rendition of said Judgment filed a motion for a new Trial &c. (for which said motion see page 20)

which said motion was by the Court continued over to the December Term of this Court 1859, & the same was overruled & denied on the 14th day of January 1860 as yet of December Term 1859, to which the said Defendants above, then & there duly excepted.

And because now of the exceptions so offered and made upon the hearing of said motion, therefore on the prayer of the said Defts Felix Coste, George I. Barnett & Mahlon Weber the Court hath to this bill of exceptions signed his name, in accordance with the provisions of the statute in such case made & provided.

A. Dusenbury Law. (Seal)

The said <u>Appeal Bond</u> is as follows:

Know all men by these presents, That we Mahlon Weber as principal and Charles D. Coleman and David Naylor as sureties are held and

firmly bound unto Fredrick Walkenhorst in the sum of one hundred and fifty dollars, for the payment of which, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at St. Louis, this 20th day of January A.D. 1860.

The Condition of the above obligation is such, that whereas Mahlon Weber George S. Barnett & Felix Coste have appealed from the judgment rendered against him and others in favor of Fredrick Walkenhorst in the Law Commissioners Court of St. Louis County for the sum of Sixty nine dollars and fifteen cents, together with costs.

Now if the said appellants will pay all costs and damages that may be awarded against them occasioned by such appeal, and shall prosecute their appeal and shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court may direct the Law Commissioners Court of St. Louis County, to give, and if the judgment or any part thereof be affirmed, that they will comply with the same so far as it may be affirmed, and will pay all damages and costs which may be awarded against them by the Supreme Court then this obligation is

37. be void, otherwise to remain in full force and effect,

M. Weber (Seal)
C. D. Colman (Seal)
D. H. Naylor (Seal)

Subscribed and approved before me this 20th day of January 1860.

A. Duesenbury
Law Commr.

Law Commissioner's Court of St. Louis County,
December Term, 1859. January 20th 1860.

This day appeared Mahlon Weber the principal and Charles D. Coleman and David Naylor the securities in the foregoing bond and acknowledge to have executed the same for the purposes therein expressed.

In Witness whereof, I hereto set my hand affixed the seal of said Court at office in St. Louis, the day and year last aforesaid.

A. Duesenbury
Law Commissioner

Said affidavit is as follows:

State of Missouri
County of St. Louis } ss. December 1859, January 20th 1860

Mahlon Weber one of the defendants in the Judgment described in the within Bond being duly sworn on his oath says, that the appeal prayed for is not taken for vexation or delay, but because affiant

38. believes the appellants are aggrieved by the Judgment of the Law Commissioners Court of St. Louis County.

Subscribed & Sworn to this 20th day of January 1860 } M. Weber

John M. Fulton Clerk

State of Missouri } ss.
County of St. Louis }

I, John M. Fulton Clerk of the Law Commissioners Court of St. Louis County, State aforesaid, hereby certify that the foregoing transcript is a true and correct copy of records, proceedings and pleadings in a case in which Frederick Walkenhorst was plaintiff and Felix Coste, Anthony M. Foster & George J. Barnett and Mahlon Weber partners by name of Barnett Weber defendants, so full and entire as the same remain of record and on file in my office

In Witness whereof, I hereto set my hand and affix the seal of said Court at office, in St. Louis this 3d day of ~~February~~ March 1860.

John M Fulton Clerk

Index

	Page
For Petition see	1
" Summons "	5
" Return of Sum. "	6
" Demurrer to Pet. "	7
" Answer of A. M. Foster "	8
" Overruling of Demurrer "	11
" Answer of Felix Coste "	12
" Continuances "	17
" Trial "	18
" Judgment "	19
" Motion for New Trial "	20
" " overruled "	21
" Bill of Exceptions "	22
" Appeal Bond "	35
" Affidavit for Appeal "	37

7. (2)

March Term 1863

Frederick Walkenhorst
respondent.

vs

Felix Coste & others
appellants.

Transcript

Law Comm's Court
M.E.

Filed March 3d 1860
Wm. S. Glanville
Clk.

Fee $13 25/100 paid
by Atty Coleman

$1050 paid by Coleman atty.

[40]

1862 May 16. Death of Mahlon Weber suggested Dp. 56
1862 May 27. Ord by Cont 1862 Nov 30 Office of
Elen H. admx of Mahlon Weber entered & cause contd Dp 114
1863 March 26. Submitted on brief
1863 April 10. Reversed and remanded. Opinion filed Dp 140

23.25 Coleman
1.25
1.50 Cost
2.50 Ad

Frederick Walkenhorst
Appellee
vs
Felix Leotte, George D. Barnett
and Mahlon Weber
impleaded with &c: Appellants

IN SUPREME COURT,
March TERM, 1860

AND now come the said Felix Leotte, George D. Barnett & Mahlon Weber and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Leotte, Barnett & Weber assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Plaintiff
2. That said Court rejected proper and legal testimony offered by
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Defendants -
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Plaintiff when it should have been rendered for the Defendants -
10. That said Court overruled the motion for a new trial, made by Defendants Leotte, Barnett & Weber -
11. That the Judgment of the Court below is erroneous, being an action upon an alleged lien, against the owner of the property, the parties contracting with the owner, & a contractor with such contractor, by a material man furnishing materials to such second contractor, and a joint judgment against all parties -

C. D. Coleman
atty for appellants -

And now come the Appellee Frederick Walkenhorst and for joinder in error say, that there is no error in the record and proceedings of said Lake Commissioners Court in said cause, as assigned by said Appellants

R F Wright
atty for appellee

No. 278

March Term 1860

Supreme Court –

Frederick Kalkenhorst
appellee

vs

Felix Coste & others
appellants –

Assignment of Errors –

C. D. Colman
Atty for Appltr –

Filed March 19. 1860.

Wm. S. Glanville

C.S.

Respondents abstract and brief

Plaintiffs petition substantially alleged

That he sold to Foster, brick material to the amount of $62.33. that said brick material were delivered at and used in the construction of a certain house in the City & County of St Louis, that said material was delivered and used between the 14th day of July and the 1st of August the last being delivered the 1st of August 1857. = That said house belonged to Felix Coste, that Weber & Barnett were the original, and said Foster sub contractor under them in the erection of said building

That on the 14th day of November 1857. & within four months after the indebtedness accrued, and after having given to said Coste ten days notice, as required by the special act of the general Assembly of the state of Missouri approved Feb 14th 1857. he filed an account of the said demand due him in the Clerks office of the St Louis Land Court, and that he accompanied the same with the name of the owner, contractor and the discription of the property, verified by his oath. That the said sum of $62.33. was due him & prays judgment for the amount due, and in case the same could not be made out of the property of Foster, that the property be sold for the satisfaction of the same.

The said Coste, Barnett & Weber demurred to the petition. And Foster filed his answer

By the demurrer it was insisted there was a defect of parties, that is that Barnett & Weber were improperly made parties

The Demurrer was overruled, and Coste afterwards filed his answer. Barnett & Weber failing to answer further =

Coste by his answer, denied that he purchased & received the brick material as alledged in the petition, = But set up that he was subcontractor, under said Barnett and Weber, for putting up seven buildings, same mentioned in pltffs petition, & that Coste was the owner of one of them as by the pltff alledged, and that between the 1st of May & the 1st of August 1837 the pltff delivered to him at said buildings about one hundred & fifty thousand hard & red brick and about ten thousand stock brick, for which he was to pay the prices alled by pltff, & that the brick were used in some or all of said buildings that pltff was to be paid for the same by him drawing orders on Barnett & Weber, which orders Barnett & Weber agreed to pay = That he drew orders from time to time upon & which were paid by Barnett & Weber, amounting to some $892, 60. that on or about 1st of August 1837, he drew his order in favor of pltff upon Barnett & Weber, for the sum of $447, 35. for the balance due the pltff by him for the said brick material, That Barnett & Weber were owing him a much larger sum, That the pltff received the order & still retains the same, & did not give him reasonable notice of the nonpayment of the same.

That the pltff had six suits against him & others all for the same cause of action, the same being each for one seventh, & cept one for two seventhes, & cept that the different owners were made defendants in the cases against their property

The Answer of Caste - sworn to by his attorney denies, or denies any knowledge of all the material facts in the peffs petition = Ect he admits that the house belonged to him & one Barth

The Case after having been several times continued, came on for trial on the 5th of October 1859 - & Barnett & Weber having failed to answer further after their demurrer had overruled, the petition was taken as confessed as to them, = The deft Foster appearing in his own behalf, & the peffs by attorney the cause was submitted to the court for trial = And on the trial the peff proved by the deft =

Anthony M Foster, that Barnett & Weber were the original ~~and~~ he Foster was the sub-contractor for the building the house in peffs petition mentioned that Felix Caste was the owner thereof, that he was to furnished the material and do the brick work of said house, as such sub contractor, together with six other houses belonging to other persons, that said seven buildings were a part of what is called the City buildings, there being 13 all together of said City buildings, that the seven houses the brick of which was done by him were all very nearly of the same size, and all built up together, & at the same time, that peff under a contract with him furnished brick for said house No 12, as ~~well as~~ also for all the houses built by him. That he agreed to give the peff $7.85 per thousand = That there remains due the peff for and on account of brick material delivered at said 7 buildings $437.35/100, one seventh of which amount about $62.47, is due the peff for brick furnished to said house number 12, if as

many bricks were delivered at it as the rest of said houses respectively, he could not state the particular amount of the bricks furnished by the pltff and in each house, they were all used in the said seven buildings, but that he believed & was satisfied that a part of said bricks were used in each of said buildings, the bricks furnished by pltff were deposited opposite, each of the seven houses as they were wanted as the work progressed — And if delivered regularly were used in about equal proportions in each house

That the buildings belonged to seperate owners

That the last bricks were delivered by plaintiff at house No 12, about the last day of July 1837 —

Pltff also proved by Henry Aulman

That he was employed by plaintiff as teamster in July 1837 & hauled bricks for pltff to City buildings, Know the house No 12 in the road, and delivered some of them to said house No 12 — the bricks were delivered regularly, and deposited, at each house could not say the exact number of bricks delivered at each of said seven houses but thought & believed each of said seven houses, got an equal portion of the bricks delivered by pltff, And believed he delivered the last of the bricks the last day of July 1837 —

The pltff then proved the filing of his lien & notice thereof, & that the same was verified & filed

as alledged in his petition & the service of said notice as alledged — by reading the same in evidence = And the cause was then submitted to the Court, And after the same was submitted the attorney of Barnett & Weber & Coste came into Court, and asked leave of the Court to argue said Cause, which was granted, & when he came afterwards to argue the same declined doing so but asked the Court, for leave to ask instructions, to which the pltff's Counsel objected, upon the grounds that the Defts had no right to ~~ask~~ instructions after the case had been submitted, which objection was overruled, And Counsel for the defts asked the following instructions which were refused

Instructions

1st If the Court sitting as a jury shall believe from the evidence in the case that the pltff delivered to Anthony M. Foster as a sub-contractor for the building of the building in this case and also for the building of six other buildings in the same row; that five of said buildings belonged to different owners, and the remaing two buildings were owned by another person; that such brick were delivered to said Foster by the pltff under one entire contract and that the sum of $437.85 remained due to said plaintiff from said Foster for the brick so delivered; that the said Foster made and delivered to the plaintiff and the plaintiff accepted and received the order of said Foster for the full amount upon settlement, after the brick were delivered, then the pltff cannot divide up the amount so as to give this Court jurisdiction

and the pleff cannot recover in the action [54]

3d If the Court sitting as a jury shall find from the evidence in the case, that the said plaintiff furnished Anthoney M Foster a large quantity of brick for the construction of seven buildings known as part of the City buildings, that said Foster was a subcontractor for the doing of the brick work for said seven buildings, that two of said buildings were owned by James H Lucas, and that each of the others were respectively owned by Felix Caste, Edward Hosen, George Johnson, Joseph J Clark and Robert Campbell, or that all of said buildings were owned by different persons, only that two of said buildings were owned by one of such persons; that such brick were delivered by the pleff and received by said Foster under a contract for the delivery thereof for the construction of all of said buildings, and were used by said Foster indiscriminately in the erection of said seven buildings; that after said brick were all delivered, a settlement or accounting of the quantity delivered was had between said pleff & said Foster, and said Foster gave the pleff and the pleff received the order of said Foster upon Bennett Weber or any other person, or persons for the amount and value thereof; that such amount was Four hundred and thirty seven $\frac{35}{100}$ dollars then the plaintiff has no ~~right~~ lien against the seperate pieces of property or buildings and the pleff cannot have judgment for the enforcement thereof against the same

3d Unless the Court shall find from the evidence in the case that the brick in question

were delivered by the Plff for the construction or erection of the particular building in question, or were used in the erection thereof. That such bricks were delivered upon a contract made and entered into after the 16th day of February AD 1837 that the bricks for which the lien is sought were not delivered in common and indiscriminately with other bricks for other buildings then in course of erection; that such bricks for this particular building were so delivered under a seperate & distinct contract therefor as distinguished from a general and entire contract for all of said seven buildings then the Plff is not entitled to any lien against the building or property in question or to any judgment for enforcement thereof.

4th If the Court shall find from the evidence that Plff delivered, Defendant Foster brick to the amount & value of $437.$\frac{35}{100}$ that such brick were delivered & received under an entire contract between Plff & Foster that the brick thus delivered & received were and are a part of those from which this alledged lien is sought to be enforced; that the demand in favor of the Plff & against said Foster was and is entire for the whole sum of $437.$\frac{35}{100}$ then the plaintiff cannot divide said claim so as to bring seperate actions against said Foster and is not entitled to recover in this action.

5th That upon the record & evidence in the case the Plff is not entitled to recover in the action or to the enforcement of any lien therein.

No 5 That if the Court sitting as a jury shall find from the evidence that the pltff delivered to said Foster a large quantity of brick for the erection of seven ~~houses~~ of the block of buildings known as the City Buildings; that such brick were delivered to & were used in the erection of said seven buildings indiscriminately by, that such seven buildings were not owned by the same person or persons; that the amount & value of said brick was over four hundred Dollars, That the plaintiffs is not entitled to any separate lien against either or any of said buildings, or for the enforcement of any such lien in this Court, and that this Court has no Jurisdiction in the Case for the enforcement of any such lien upon the record & evidence in the Case.

The Court gave the defts the following instruction

No 6 That unless the Court shall find that the brick in question were delivered to and for, or were used in the erection of the building in question, then the pltff cannot recover against any of the Defendants other than Foster or have or enforce any lien against the property in question

The Court rendered judgment against the defts. for the sum of $69.15/100 and also that if sufficient property of the defts could not be found out of which the judgment could be made that the property in the petition

describing it should be sold for the satisfaction thereof.

On the 10th of Nov 1859

Felix Coste, George J Barnett & Mahlon Webber entered this motion ~~for a new~~ to set aside the judgment & for a new trial, upon the following grounds.

1st Because the evidence given on the trial was insufficient to authorize a judgment in favor of the Pltff in the action

2d Because there is no allegation in the pleadings, or any evidence given on the trial to authorize any general judgment in the action against the Deft Coste Barnett & Webber or either of them

3d Because the judgment is general against all of the Defts, as well as special against the property.

4th Because the Court improperly refused instructions and declarations of law asked by Defts

5th Because the judgment is contrary to law & evidence & unsupported by either.

And said Defts also moved in arrest of judgment for the reasons stated in the 2d & 3d Reasons for new trial as above set forth = which motion was overruled by the Court; and that on the 20th of June 1860, one of the defts Mahlon Webber, and paye

an appeal to this Court, & filed his bill of 24 exceptions, & filed his appeal bond with Charles D Colman & David Naylor as securities, which was approved by the Court & said Appeal granted, upon said Webbs affidavit

~~Respondents points and by~~

Errors assigned

1st that said Court admitted improper & illegal testimony offered by Deft

2d That the Court ~~gave to the Jury~~ refused to give to the Jury proper and legal instructions offered by Deft

3 That the verdict was against the evidence

6 That the verdict was against law

7 That the verdict was against both law and evidence, & against the law under the evidence

8 That the verdict was against the weight of evidence

9 That the judgment was rendered in favor of the Deft when it should have been rendered for the Defts

10 That said Court overruled the motion for a new trial made by Defendants Leasle Barnitz & Weber

11th That the judgment of the Court below is erroneous being an action upon an alledged lien against the owner of the property parties contracting with the owner ~~of the property~~ & a contractor with such contractors by a material man furnishing materials to such second contractor & a joint judgment against all parties

Respondents points & brief

1st The judgment is ~~apply~~ amply supported by the proof

2d The Court properly refused the the 1st, 2d, 3d, 4th, 5th, & 7th instructions asked by Appalants
Laws of Missouri for the year 1857 - Page 669 sec 8 & 19

3d The appalants instructions were not asked in due time

4th It may be that the judgment below is liable to the objection insisted upon by the 11th error assigned by appalants, but if so, I submit that such error is merely informal and that this Court under the law, Case, and in this Case, should ~~reform~~ ~~render~~ give such judgment in the case as the Court below, ~~should~~ ought to have ~~entered~~ given = it appearing from the record that the Respondant is justly entitled, to the money he has sued for, R. S. Page 1301 sec 35

R F Wingate
atty for Respt

No 137

Fredrick Walkenhurst
vs
Felix Casto et al
appelants

Respondents
abstract & brief

Filed April 29. 1862
A. W. Mead
Clk

R. F. Wingate
for Respondents

Frederick Walkenhorst - Appellee
vs
Felix Coste, George I. Barnett and Mahlon Weber Appellants.

In the Supreme Court -

March Term 1863 -

Statement of case on the part of the Appellants -

This action was commenced in the Law Commissioner's Court of St Louis County, with a view of enforcing an alleged Lien, under the Mechanics Lien law of St Louis County, approved February 14, 1857, against the appellants, and one Antony M. Foster -

The Petition of the Plaintiff alleges that Coste was the owner in fee, of the property sought to be charged with the lien; that, Barnett & Weber as Partners, were the original contractors for the furnishing of the materials and erecting the building, and that Foster was a Sub-contractor under Barnett & Weber for furnishing and laying all of the brick work of the same; that to enable Foster to comply with his contract with Barnett & Weber, he purchased certain brick of the Plaintiff amounting to $62.33, for which Foster became and still was indebted to Plaintiff, and that said brick were delivered to said Foster, and used by him in the erection of the building, but nowhere contains any allegation of any indebtedness on the part of either of the Defendants except Foster, or any allegation of any contract with, or liability of, any one except, said Foster -

The Defendants Coste, Barnett & Weber, filed a joint Demurrer to the Petition, alleging a defect of Parties defendant, and that Barnett & Weber were improperly joined &c.
The Defendant Foster filed a Separate answer on his part.
The Court overruled the Demurrer filed by Coste, Barnett & Weber, and afterwards the Defendant Coste filed his Separate answer, denying all of the Material allegations of the Petition, and thereupon the cause was continued from time to time, until on or about the 8th day of November 1859, when the Plaintiff tried the case, or the most of it in the absence of the Defendants Coste, Barnett & Weber, taking a judgment by default for want of an answer against Barnett & Weber.
The Court, however, allowed the Counsel of Coste, Barnett & Weber, to file, or present instructions, which were passed upon.
These instructions will be found at pages 30 to 34 inclusive of the Manuscript, all of which, except the 6th were refused.
As some of the principal questions arising upon the instructions, are not presented by the evidence preserved in the Bill of Exceptions, it may not be proper to present such questions at this time, & the instructions asked and refused, are therefore not set forth in this Statement, although the Court is respectfully referred to such instructions.
The Court thereupon rendered a general judgment, against all of the

Defendants sued in the action, the Judgment being captioned against all of the Defendants, and the Court "doth find that the Defendants are indebted to the Plaintiff" and "that the Plaintiff recover of the Defendants", "and thereof have execution" and "that if no sufficient property of the Defendants be found to satisfy the Judgment herein, the same shall be levied out of the property chargeable with the lien herein, viz: describing it -

Afterwards, within proper time the Defendants Coste, Barrett & Weber filed a Motion for a New Trial, the Second & third causes assigned being as follows, viz:

"2° Because there is no allegation in the Pleadings, or any evidence given on the trial to authorize a general judgment in the action against the Defendants Coste, Barrett & Weber, or either of them" -

"3 - Because the Judgment is general against all of the Defendants, as well as special against the property" -

The Motion was overruled, and a Bill of Exceptions, preserving the case, was duly signed and filed, and removed into this Court by appeal -

The Court is respectfully referred to the evidence of the Defendant at pages 238 following of the Transcript, upon which some of the instructions were introduced to be framed, but not bearing the evidence, had to be drawn, in the dark -

C. S. Coleman
Atty for Appellts -

Frederick Walkenhorst Appellee vs Felix Coste, George I. Barnett & Mahlon Weber Appellants	In the Supreme Court - March Term 1863 - Brief & Points on the part of Appellants -

I. The Court below erred in overruling the Demurrer filed by the Defendants Coste, Barnett and Weber -

a - The Defendants Barnett & Weber were not, nor was either of them, necessary, or could be, properly, Parties to the action -

They were not "parties to the contract" on which the action was founded, nor "interested in the matter in controversy, and in the property charged with the lien", or in either -

Laws 1857. page 669. § 8 -

b - The Petition of the Plaintiff contains no allegation or Statement, authorizing or requiring them to be made Parties -

It would perhaps have been more proper, that the Defendants Barnett & Weber, had alone demurred to the Petition, instead of, joining with Coste, in the Demurrer, but, the joining of Coste, cannot affect the rights of Barnett & Weber, if Barnett and Weber, were improperly joined as Defendants.

It is not, as if Coste <u>alone</u> had interposed a Demurrer, for the improper joinder of Barnett & Weber, as Defendants -

The case does not fall within, and cannot be governed by the principle of the case of Ashby vs Winston 26th No. 210 -

c- By the overruling of the Demurrer, the Court held Barnett and Weber as necessary & proper Parties to the action, and being Parties to the Record, were rendered incompetent, as witnesses, for the Defendants -

It is true, that they were not offered as witnesses in the case, for the reason, that the cause was wrongly tried, in the absence of the Counsel for the Appellants, but the overruling of the Demurrer, was a decision against their admissibility, as witnesses in the action -

II. The Judgment rendered by the Law Commissioner's Court, was unauthorized, and is irregular and illegal -

a- The Judgment is not based upon, or authorized by, the Pleadings in the action -

b- It is not warranted by the evidence given in the case -

And it is only in a case, where the pleadings and evidence will authorize a general Judgment against the owner of the property sought to be charged with the lien, that such a judgment can be rendered -

Patrick vs Meeks, 27th Mo, 184 -

Every judgment or Decree, must be founded upon, and in accordance with the allegations and proofs in the action -

c- It finds, that <u>all</u> of the Defendants are indebted to the Plaintiff, whereas the Petition only charges <u>Foster</u> to be indebted -

It cannot be necessary to argue this question, or assign reasons for the incorrectness of the Judgment rendered, as it appears both upon principle, and from the Statute, that such a Judgment is irregular, and unauthorized, and I was under the impression that this Court had decided the question, but I have not found the case in which it is decided, if at all.

And most certainly, the Plaintiff, under the allegations of his Petition has no better right to a judgment, as against Barrett & Weber, or either of them, than as against the members of this Court.

They stand upon their Demurrer, and the Judgment against them is by Default, and if irregular must be reversed—

III. An important point in the case, and upon which I intended to rely, in the trial, (and which perhaps is sufficiently presented by the Evidence contained in the Bill of Exceptions and the instructions) is, whether a Material-man, who furnishes materials to a Sub contractor, for doing part of the work to several buildings, belonging to several different persons, under an entire contract, for the whole work, and not under separate contracts, as to each building, and upon which contract, an amount exceeding the Jurisdiction of the Court remains due, can divide up such gross amount due him, into several causes of action, & bring separate actions therefor—

It would seem, both upon principle and authority, that this cannot be done; the claim against the Subcontractor is entire; he cannot be subjected to Seperate actions, upon an entire demand; and a judgment in one action, for a part of an entire demand, would be a bar to the other actions —

Not that the Plaintiff holding such a claim is remediless, by any means; he may file his Lien as against the entire property, and commence his action against the Subcontractor, and all of the owners of the property, jointly, in which action, the Court can, and would adjust & determine the respective rights & liabilities of each and all of the Parties —

The Judgment below, should be Reversed —

C. D. Colman
Atty for Appltts —

Frederick Walkenhorst
vs
Felix Coste et al —

Statement & Brief & c of Appellants —

Filed March 27. 1863
A. W. Mead
Clerk
C. D. Colman
Atty for Appltts —

Walkenhorst
vs
Coste & others

This was a suit for the enforcement of a Mechanics lien. The building was owned by Coste; Barnet & Weber were contractors to erect it ~~and under a contract~~ Foster was a contractor with them to do the brick-work and the plaintiff under a contract with Foster furnished brick, for which the lien was filed.— Barnet & Weber were the contractors for the erection of a row of seven buildings owned by different persons; Coste being the owner of one of them Foster had one contract with ~~them~~ Barnet & Weber to do the brick work of the whole seven, and the plaintiff under one contract with Foster furnished brick for the whole seven, and having a balance due him from Foster, divided up his account so as to charge a portion of it against each building as they were owned by different individuals.

This suit was brought against Foster— Barnet & Weber and Coste, the owner of one of the buildings.— Coste, Barnet & Weber demurred to the petition for a misjoinder of parties defendant in making Barnet & Weber parties. The demurrer was overruled. Barnet & Weber stood upon the demurrer. Coste answered over. Foster answered.

There was a trial, and judgment given for the plaintiff. The judgment was general against all the defendants and special against the property.

The defendants asked several instructions to the effect that the plaintiff could not divide up his account so as to charge each building seperately with a lien. They were refused. The Court gave on motion of the defendants this instruction "Unless the Court shall find that the brick in question were delivered to and for or were used in the erection of the building in question, then the plaintiff cannot recover against any of the defendants other than Foster, or have

or enforce any lien against the property in question"

There was no error in making Barnet & Weber parties. They may not have been necessary parties, but they could lawfully be made defendants. Laws of 1857 page 669 sec 8. The demurrer was properly overruled. —

The instruction given stated the law correctly, and there was no error in refusing the others, because the plaintiffs right to a lien upon the property does not depend upon the character of his contract with Foster in respect to the matters on account of which objection is made to it. If he furnished brick which were used in the building he is entitled to his lien upon it unless his contract directly debarred him from it.

The judgment must however be reversed because it is general against all the defendants, not only the debtor of the plaintiff but the first contractors and the owner of the building.

Judgment reversed & cause remanded.

Barton Bales

Judges Bay & Dryden concur.

15

Walkenhorst
vs
Coste & others

Opinion
Reversed & remanded
Bates

Filed April 10. 1863
A W Mead
Clerk