Heltzell, MD v. Hynes, William & Walton, Nicholas 1865

535/3

640/19

35/482

Wise for R
Eaton - A

Hetzell R

v

Hynes A

Sept 62
March 63
St L

P sold to Walk (df) goods value of 142 st

Walk used the same in the completion of brick bus
owned by Hyn

entire
med lien

must be for days before
deff & lien - only 8

Reversed & Remanded Dredge

State of Missouri
County of St Louis } ss

Be it remembered that on the 16th day of the month of July, in the year of our Lord One thousand eight hundred and sixty one was filed in the office of the Clerk of the Law Commissioner's Court of St Louis County, a petition in a certain cause wherein Michael D. Heltzell is plaintiff & William R. Hynes & Nicholas Walton are defendants, which petition is in the words & figures following, to wit:

Petition

Michael D. Heltzell	In the Law Commrs. Court, Aug. Term. 1861,
"	
William R. Hynes & Nicholas Walton	St Louis County

Michael D. Heltzell, plaintiff, complains of William R. Hynes and Nicholas Walton, defts, and asks judgment — for that whereas, heretofore, to wit, on the 14th day of March, A.D. 1861, said plaintiff sold & delivered to the defendant Walton, the articles specified in the bill of items hereto annexed marked "exhibit A", at the several prices therein stipulated, which was a just price & value of the same, all being of the value of one hundred & forty two 58/100 dollars; and that, thereupon the said Walton used the same in the building & completion of several brick buildings in the County aforesaid & City of St Louis, described and

2 bounded as follows; situate upon lots numbered 14, 15, 16, 17, 18, 19 in block 16, or 981 City Block, bounded South by Morgan street, West by Jeffingwell avenue, North by an alley & ~~XXX~~ East by a line parallel with Jeffingwell avenue, at a distance of one hundred & fifty five feet, 3 inches therefrom, said building having a front of said number of feet on said Morgan street,

And plaintiff states that said buildings belong to the defendant William R. Hynes and that the same were built by the defendant Nicholas Walton, who was the contractor for building the same, and that the said materials furnished were furnished immediately to James Luscomb, and were thereupon incorporated into the said buildings, in that the indebtedness has accrued on account of the sale & delivery aforesaid within the last four months, and that he has filed with the Clerk of the Land Court within & for the County of St. Louis, a just and true account of the said demand & lien after all just credits have been given, with the name of the owner & contractor duly verified — said account being filed on the 6th day of July, 1861, of which he gave due notice on the 28th day of June, next prior — whereby he, said plaintiff, has acquired a lien upon said property described, according to the statute in such case made & provided,

Plaintiff asks judgment against said

3 defendants for the sum of one hundred and forty two dollars & sixty eight cents, with interest from the 9th day of May, A.D. 1861, and that the same be enforced upon the lien acquired aforesaid,

Michael D. Beltzell
by Isaac P. Wise, Atty.

Samuel L. Jones, agent for the plaintiff, being duly sworn, makes affidavit that the matters stated in the foregoing petition are true, to the best of his knowledge and belief.

Saml. L. Jones

Sworn to before me,
this 16th day of July, A.D. 1861,

John M. Fulton, Clerk,

Endorsed, filed July 16, 1861,
John M. Fulton, Clerk,

Whereupon, on said 16th day of July, in said last mentioned year, a summons was issued for said defendants, which summons is in words & figures following, to wit;

Summons

The State of Missouri
To the Marshal of St. Louis County --- Greeting:
We command you to summon William R Hynes & Nicholas Walton to appear before the Law Commissioners Court of St Louis County, on the first day of the next term thereof, to be held at the City of St. Louis, within & for the County of St. Louis, on the first Monday of August next, then & there to answer the complaint

4 of Michael D. Keltzell, as set forth in the annexed petition; & have you then & there this writ,
Witness, John M. Fulton, Clerk of the Law Commissioner's Court of St. Louis County, with the seal of said Court hereto affixed, at office in the City of St. Louis,
{L.S.} this 16th day of July, in the year of our Lord one thousand eight hundred & sixty one,

John M. Fulton, Clerk

Which summons was returned by said Marshal, endorsed as follows, to wit;

Marshal's Return,

Executed this writ in St. Louis County, July 18th 1861, by delivering a true copy of the writ & petition to the within named Nicholas Walton, The within named William R. Hynes is not found in St. Louis County,

Peter Wegman, Marshal,

At a Term of said Court begun & held at the City of St. Louis, in & for said County, on Monday, the 2d day of December, in said last mentioned year, the following proceedings took place in said cause, on Thursday, the 5th day of said month to wit;

Court,

Michael D. Keltzell
Wm R. Hynes et al } By order of Court continued

And at a term of said Court begun and held as aforesaid, on Monday, the 3rd day of February, in

5 the year 1862, the following further proceedings took place in said cause, on Saturday the 8th day of February, in said last mentioned year, to wit:

Alias for Hynes ordered

Michael D. Heltzell
v.
William R. Hynes & Nicholas Walton

On motion of plaintiff's attorney an alias summons is ordered for the defendant Wm. R. Hynes.

Whereupon, on the 19th day of March, A.D. 1862, an alias summons was issued for said defendant Wm. R. Hynes, which summons is in the words & figures following, to wit;

Alias Summons

St. Louis County,
The State of Missouri,

To the Marshal of St. Louis County -- Greeting;

We command you to summon William R. Hynes to appear before the Judge of our Law Commissioner's Court, on the first day of the next term thereof, to be held in the City of St. Louis, within & for the County of St. Louis, on the first Monday of April, next, then & there to answer the complaint of Michael D. Heltzell, as set forth in the annexed petition; & have you then & there this writ

Witness, W. C. Huffman, Clerk of our said Court, with the seal thereof hereto affixed, at office in the City of St. Louis, this 19th day of March, in the year of our Lord eighteen hundred & sixty two

{L.S.}

W. C. Huffman, Clerk

6 Which summons was returned by the Marshal, endorsed as follows, to wit:

Marshal's Return — Executed this writ in St. Louis County, March 19th 1862, by delivering a true copy of the same to William R. Hynes, Peter Wegman, Marshal.

And at a term of said Court, begun and held as aforesaid, on Monday, the 7th day of April, A.D. 1862, the following further proceedings took place in said cause, on Thursday, the 10th day of April, in said last mentioned year, to wit;

Cont. — M. D. Heltzell
" } By order of Court continued
Wm. R. Hynes et al

And on the 12th day of said month of April, in said last mentioned year, the said defendant William R. Hynes filed his answer to the plaintiff's petition, which answer is in the words & figures following, to wit;

Answer of W. R. Hynes — Michael D. Heltzell
" } In the Law Commissioner's Court,
William R. Hynes impleaded with Nicholas Walton

For his separate answer to said petition, said Wm. R. Hynes says it is not true that said Heltzell has any cause of action against this defendant, or any right of lien, or lien, against any property of defendant, as

7 in said petition alleged,

This defendant also charges that said plaintiff has, by unnecessary delay, lost his pretended cause of action against this defendant, in this, that said petition was filed in this Court on the 16th of July, 1861, & that this defendant was returned at the last August term of this Court, by the Marshal of this Court as "not found", on the writ issued upon said petition; that no alias writ was asked or issued against this defendant at the August, October and December terms of this Court, last past, nor until the 19th day of March last, on the 19th day of which month this defendant was served with a writ herein.

Defendant avers that during the interval between said July 16th & said 19th day of March, this defendant has been a resident of the County of St. Louis, & might have been served with process by the use of ordinary diligence; — Wherefore this defendant prays to be hence discharged & for costs.

For further answer to said petition, this defendant denies that on the 14th day of March, 1861, or at any other time, plaintiff sold & delivered to said Walton, the articles specified in the bill of items alleged to be annexed to petition & marked exhibit A, or any part thereof, or at the alleged prices thereof. Nor has this defendant knowledge or information sufficient to form a belief whether said alleged prices are just, or whether said articles, if sold & delivered, were of the value of

8 $142.50 as charged, & therefore denies the same,

Further, this defendant denies that said Walton used said articles in the building and completion of the buildings mentioned in the petition,

As to the allegation of the petition that said materials were furnished immediately to James Luscomb & were thereupon incorporated into said buildings, this defendant has not information or knowledge sufficient to form a belief that the same were furnished to said Luscomb, & hence he denies the same; and he avers the fact to be that said Luscomb was a sub contractor under said Walton, & that said articles & materials, if proved to have been furnished, to said Luscomb, by said plaintiff, & used in said buildings, were only furnished to said Luscomb, and by him used & incorporated in said building, & that said Walton had no connection therewith; - wherefore plaintiff can have no lien for the same and can maintain no action against this defendant; & said Luscomb should have been made a party to this action & have been named in plaintiff's alleged lien a/c as a sub contractor under said Walton, which was not done,

This defendant also avers that said petition fixes no date at which said pretended indebtedness of said Walton to plaintiff, accrued, and this defendant cannot thereby, nor can the Court ascertain therefrom, whether plaintiff has taken

9 due & sufficient preliminary measures so as in law to be entitled to his pretended lien, and hence this defendant denies the same,

This defendant has not knowledge or information sufficient to form a belief, whether or not plaintiff, on the 6th day of July, 1861, filed with the Clerk of the said Court a just & true a/c of his said pretended demand, with all just credit given with the name of the owner & contractor, and duly verified, & therefore denies the same,

This defendant further says he admits receiving from some person the paper herewith filed, marked, "M" on the 28th day of June, 1861, & denies service on him of any other notice of said pretended lien; & he is advised that said paper "M" is not in law due & sufficient notice, and hence denies any due & sufficient notice of said pretended lien.

This defendant says that on the 19th day of June, 1861, he settled in full with said James Luscomb for all demands connected with said buildings, & that by reason thereof & the delay of service on this defendant as hereinbefore stated, all right of action against this defendant that said plaintiff might otherwise have had, has been lost by plaintiff by his own default,

This defendant denies that plaintiff can recover for interest prior to service on this defendant

10 & also denies that a lien can be had for plaintiff's items of damage,

And having fully answered, this defendant prays to be hence discharged & for his costs.

Lucien Eaton
Attorney for Wm R. Hynes

Wm R. Hynes, being duly sworn on oath says the foregoing answer & the matters therein as stated, are true to the best of his knowledge & belief.

Wm R. Hynes

Sworn to before me, this 12th April, 1862,
John C. H. Cunningham, Justice.

And at a term of said Court begun and held as aforesaid, on Monday, the 2d day of June, A.D. 1862, the following further proceedings took place, in said cause, on Thursday, the 5th day of June, in said last mentioned year, to wit;

Tried by Court & adviement

Michael D. Helzell
"
William R. Hynes
Nicholas Walton

This day come the parties by attorneys, and waiving a jury, submit this cause to the Court; and the Court having heard the evidence, not being fully advised of the premises, takes time to consider.

And at said term of said Court begun & held as aforesaid, the following further proceedings took

11 place in said cause, on Monday, the 9th day of June, in said last mentioned year, to wit;

Judgt for Peff, for $157,53 with lien

Michael D. Heltzell
"
William R. Hynes &
Nicholas Walton

The Court having duly considered the evidence herein, & being fully advised of the premises, doth find that the defendants are indebted to the plaintiff in the sum of One hundred & fifty one dollars and fifty three cents. It is therefore ordered and adjudged by the Court that the plaintiff recover of the defendants the sum aforesaid & his costs expended herein, and have execution therefor, And this being an action upon a Mechanics lien, it is further ordered 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 following described property chargeable with the lien herein, viz: "Seven brick buildings in the County aforesaid & City of St. Louis, described and bounded as follows: situate upon lots numbered 14, 15, 16, 17, 18, 19 in Block 16 or 981, City Block, bounded South by Morgan street, West by Leffingwell avenue, North by an alley, & East by a line paralel with Leffingwell avenue, at a distance of one hundred & fifty five feet 3 inches therefrom — said buildings having a front of said number of feet on said Morgan street," And it is ordered that

a transcript of this judgment be filed in the Clerk's office of the St. Louis Land Court,

And at said term of said Court begun & held as aforesaid, the following further proceedings took place in said cause, on Wednesday, the 11th day of June, in said last mentioned year, to wit;

Motion for new trial filed

Michael D. Keltzell
"
William R. Hynes &
Nicholas Walton

Motion for new trial filed by defendant Hynes,

And at said term of said Court begun & held as aforesaid, the following further proceedings took place in said cause, on Thursday, the 12th day of June, in said last mentioned year, to wit;

Mo. in arrest of judgt. filed

Michael D. Keltzell
"
William R. Hynes &
Nicholas Walton

Motion in arrest of judgment filed

And at said term of said Court begun & held as aforesaid, the following further proceedings took place in said cause, on Saturday, the 21st day of June, in said last mentioned year, to wit;

13 Michael D. Heltzell
"
William R. Hynes &
Nicholas Walton

Mo. for new trial & in arrest overruled

The parties by attorneys come & submit to the Court the motion for a new trial & in arrest of Judgment herein, And the Court having considered said motion, and being fully advised thereof, overrules the same,

And on the 24th day of said month of June, in said last mentioned year, the said defendant filed his affidavit for appeal in the words & figures following, to wit;

M. D. Heltzell
"
Nicholas Walton &
Wm. R. Hynes

Affdt. for appeal

In Law Commissioner's Court,

St. Louis County,

Wm. R. Hynes, the appellant in above cause, being duly sworn on oath, states that the appeal in said cause is not made for vexation or delay, but because this affiant believes that he is aggrieved by the judgment & decision of the Court,

W. R. Hynes

Subscribed & sworn to before me, this June 24, 1862,

W. C. Huffman, Clk.

And on said last mentioned day in said year, said defendant filed his appeal bond in the

Bond, 14 words & figures following, to wit;

Know all men by these presents that we, William R. Aynes as principal and Wm Ballintine & R. D. Hanenkamp as sureties, are held & firmly bound unto Michael D. Heltzell in the sum of three hundred & ten dollars, for the payment of which, well & truly to be made, we bind ourselves, our heirs, executors & administrators, jointly & severally, firmly by these presents, sealed with our seals & dated at St. Louis, this 24th day of June, A. D. 1862,

The condition of the above obligation is such that whereas William R. Aynes has appealed from the judgment rendered against him and in favor of Michael D. Heltzell, in the Law Commissioner's Court of St. Louis County, for the sum of one hundred & fifty one dollars & fifty three cents, together with costs,

Now, if the said appellant will pay all costs & damages that may be awarded against him occasioned by such appeal, & shall prosecute his appeal & shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court may direct the Law Commissioner's Court of St. Louis County, to give, and if the judgment or any part thereof be affirmed, that he will comply with & perform the same so far as it may be affirmed, & will pay all damages

15 & costs which may be awarded against him by the Supreme Court, then this obligation to be void, otherwise to remain in full force & effect,

W. R. Hynes (seal)
William Ballentine (seal)
R. P. Hanenkamp (seal)

Law Commissioner's Court of St. Louis County, June Term, 1862, June 24, 1862,

This day appeared Wm R Hynes, the principal & William Ballentine & R. P. Hanenkamp, the securities in the foregoing bond & acknowledged to have executed the same for the purposes therein expressed,

In witness whereof, I hereto set my hand & affix the seal of said Court, at office, in St Louis the day & year last aforesaid (L. S.)

W. C. Huffman, Clerk

And at said term of said Court begun & held as aforesaid the following further proceedings took place in said cause, on Thursday, the 26th day of June, in said last mentioned year, to wit;

Bill of Ex, filed & appeal granted

Michael D. Heltzell ;
William R. Hynes & Nicholas Walton } Bill of Exceptions filed & appeal to the Supreme Court granted the defendants,

16 Said Bill of Exceptions filed on said 26th day of June, in said last mentioned year, is in the words & figures following, to wit:

Bill of Exceptions

Michael D. Heltzell
"
Nicholas Walton & Wm. R. Hynes } In the Law Commissioner's Court,

Be it remembered that at the trial of this cause the plaintiff introduced as a witness, James Luscomb, who testified that he knew the parties to this suit; that the account marked "Exhibit A" to plaintiff's petition was correct, said exhibit is as follows;

"Exhibit A,

Wm. R. Hynes & Nicholas Walton
To Michael D. Heltzell Dr.

1861,					
March 14	13 bags hair, 566 lbs, – 70 6/8 bushels 25¢ pr bush,				1769
	17 " " 696 " 85 6/8 " 25¢ "				1926
	Drayage				100
Apr. 8	8 Bbls. plaster 3,00	24,00			
	1 Keg Nails	625			
	Drayage	90			3115
9	1 Keg nails				625
15	1 do do	625			625
	9 sacks hair 610 lbs 76 1/8 bush 25¢				1903

17	Drayage		90
22	1 Keg nails		625
26	1 " "	625	
	6 bbls. plaster 3,00	1800	
	Drayage	90	2575
May 9	3 bbls. plaster 3,00 9,00 drayage 75		975
			$142,68

~~James~~ Samuel L. James, being duly sworn, makes affidavit that the foregoing bill of items is true & correct, to the best of his knowledge & belief. Saml. L. James

Sworn to before me, this
16th day of July, A.D. 1861 John M. Fulton, Clerk."

Witness further testified that the dates of the exhibit were correct; that he had seen Mr. Hynes who inquired of him if the bill was correct, & he had assured him it was; that Heltzell was there present & Hynes told Heltzell to come around in a day or two; that Hynes offered to pay Heltzell's bill if he would throw off thirty three per cent as witness had done, but Heltzell would not accept the offer.

Deft. Hynes duly objected to the admission of any testimony in reference to a compromise, but his objection was overruled by the Court and said deft. duly excepted.

Witness further testified that Heltzell & Hynes did not settle; that he was foreman of

18 the work on the buildings; that sometimes he & sometimes Walton ordered the articles specified in the bill of items, but he was sure the bill was generally correct, The articles left at the buildings corresponded with Heltzell's bill.

Plaintiff then offered in evidence the following paper:

Lien "Michael D. Heltzell }
William R. Hynes }

Michael D. Heltzell states that the following is a just & true account of materials furnished by him, & the prices thereof, as also of monies expended in delivery of the same to Nicholas Walton, Contractor, by James Luscomb, plasterer, and which entered into the construction of certain buildings belonging to William R. Hynes, in the City & County of St. Louis & State of Missouri - said account being as follows, to wit:

1861 March 14	13 bags hair 566 lbs - 70 6/8 bush at 25¢	1769
	12 " " 696 " 83 6/8 " 25¢	1926
	Drayage	100
Apr. 8	8 bbls. plaster 3.00 - 24.00 1 Keg nails 6.25 dray 90	3115
9	1 Keg nails	625
15	1 do do 6.25	
	9 sacks hair, 610 lbs 76 1/8 bush 19.03 dray 90 19.93	2618
22	1 Keg nails	625
26	1 do do 6.25	

19	6 bbls. plaster 3,00	18,00	
	drayage	90	25,15
May 9	3 bbls. plaster 3 = 9,00 drayage 75		9,75
		Total due	$142,68

And said buildings, seven in number, being situate upon certain lots of ground described & bounded as follows; Lots number 14, 15, 16, 17, 18, 19, in block 16, bounded South by Morgan street, West by Leffingwell avenue, North by an alley, said lots lying contiguous, and bounded on the East by a line paralel with Leffingwell avenue, & one hundred & fifty five feet distant therefrom, which is the front of the same & of the buildings aforesaid on Morgan street; & said Heltzell states that the said materials were furnished at the dates & prices stated therein; that all just credits have been given, & he states that the indebtedness on said account has accrued within the last four months; & he files this statement & account for the purpose of securing a lien upon the property described herein according to statute in such case made & provided. Michael D. Heltzell

Mr. Isaac T. Wise, Atty.

Samuel L. James - agent for the plaintiff - being duly sworn, makes affidavit that the matters stated in the foregoing petition subscribed by him, are true Saml L James

Sworn to & subscribed before me, this 6th day of July, A. D. 1861, as witness my hand & notarial seal

Edmund P. Walsh,
Noty, Pub.

20 Deft. Hynes admitted the correctness of the endorsement "Filed July 6th 1861, E. P. Walsh, Clerk" & that Walsh was Clerk & his signature genuine, but objected to the admission of said paper in evidence, for these reasons, to wit;

1st It did not state facts to constitute a lien in this,

A. It contains ~~to~~ no statement that notice of intention to file a lien had been given, and no notice accompanied it.

B. It does not show that the materials were furnished for the building mentioned, or even to Walton,

C. It does not show that Walton was a contractor with any one — certainly not with Hynes

D. It does not show when the account accrued,

E. It does not designate sufficiently the special law under which it is sought to be made a lien,

F. It attempts to establish a lien for money expended in delivering materials to Walton & not at the building,

G. It does not show that the lots of ground belonged to Hynes

H. It does not show that the prices charged are just & reasonable — nor that the materials &c were of the value charged,

2nd Because it does not describe the same property described in the petition

21 3d Because it is not duly verified by affidavit in this, court:

A. The affidavit attached is signed by Samuel L. James refers to a petition subscribed by him, James. This is not a petition signed by him.

4th Because said paper is not signed by plaintiff, or by any one shown on the papers to be authorized to sign his name,

All which objections the Court overruled, and Deft. Hynes then & there at the moment duly excepted & said paper was read in evidence,

Plaintiff then offered in evidence the following paper & the Marshal's return of service thereon, which paper & return are as follows:

Notice of Lien

"Mr. William R. Hynes:

You are hereby notified that I, the undersigned holds a claim against the certain building owned by you — also against the real estate appurtenant, the same being seven three story brick dwelling houses situated on the North side of Morgan street between Beaumont St & Leffingwell avenue, said claim being for materials entering into the construction of said buildings & being sold & delivered by the undersigned to James Luscomb, plasterer, by him used in the construction of said buildings, the materials, time of delivery & prices being as follows:

March 14 1861 13 Bags hair, 566 lbs 70 lbs bush 25¢ pr bush, 1769

22	12 " " 696 lbs. 83 6/8 " 23 "	1926
	Drayage	100
April 8	8 Bbls. plaster 3,00	2400
" "	1 Keg nails 6.25 Drayage 90	715
" 9	1 Keg nails	625
" 15	1 do do	625
" "	9 sacks hair 600 lbs. 96 1/8 Bush. 25¢	1903
" "	Drayage	90
22	1 Keg nails	625
26	1 do do 6,25 6 Bbls. plaster 3,00 = 18,00	2425
	Drayage	90
May 9	3 bbls. plaster 3,00 = 9.00 Drayage 75	975
		$142,68

and that, unless said claim be paid, I shall file a lien upon said property to secure and enforce payment of the same according to law,

Michael D. Heltzell
pr. Isaac T. Wise, Atty &c."

Which notice was returned by the Marshal of St. Louis County, endorsed as follows, to wit:

Marshal's Return of Notice. "Executed this notice in St Louis County, June 28, 1861, by delivering a true copy to the within named William R. Hynes,

Peter Wegman, Marshal"

Deft. admitted the correctness of the said return but objected to the admission of said notice in

23 evidence, for these reasons, to wit:

1st Because there is no allegation in the petition that a written notice or any notice was given to deft. Hynes

2nd Because said notice is too indefinite,

3d Because it fails to show a cause for the lien alleged in this cause, in this,

A. That it does not identify the property mentioned with that described in the petition

B. It is for a claim against James Luscomb not against Nicholas Walton,

C. It does not show that Luscomb was a contractor or had any connection with Walton & does not refer to Walton,

D. It does not show that the materials mentioned were furnished for the buildings described in it,

E. It is not signed by Melzell or by any one shown to be authorized to sign or serve the same,

F. It does not state the prices charged were just reasonable or were the values of the articles,

G. It does not state facts so authenticated as to have justified Hynes in paying the bill; its payment would have been no defence against Walton,

4th Because the notice is immaterial and irrelevant to this cause

5th Because it was not served in time, was served less than ten days prior to the filing of the lien

All which objections the Court overruled and deft. Hynes at the moment duly excepted.

Said notice was then read in evidence. This was all the evidence in the case.

Deft. Hynes then asked instructions No. 1, 2 & 3, as follows:

Instructions for deft. Refused

(1.) Upon the pleadings & the evidence in this case, the defend. Wm R Hynes is entitled to a verdict in his favor.

do Given

(2.) The plaintiff cannot recover as against the defendant William R. Hynes, unless it appear from the evidence in the case that the articles specified in the bill of items were furnished by the plaintiff to defendant Walton expressly & purposely for the identical houses mentioned in the petition

do Refused

(3.) As against defendant Hynes the plaintiff cannot recover for the items of drayage in the account sued for.

The Court gave instruction number 2, but refused No. 1 & 3 to which refusal deft. Hynes at the moment duly excepted.

The Court sitting as a Jury, found a verdict for the plaintiff against both defendants.

Afterwards, and in due season, deft. Hynes filed his motion for a new trial in words and figures as follows, to wit:

25 Mo. for new trial

M. D. Helzell
v
Nicholas Walton & Wm R. Hynes

In the Law Commissioner's Court

St. Louis County,

Now comes said William R. Hynes & moves the Court to set aside the verdict & judgment rendered in said case against him & to grant a new trial therein for these reasons;

1st Because the Court admitted illegal and incompetent evidence for pltff. against the objections of this defendant,

2nd Because the Court refused legal and proper instructions asked by this defendant, and gave illegal & incompetent instructions asked by pltff.

3d Because the verdict is against the law, against the evidence & the weight of evidence & against the law & the evidence & the law under the evidence & is against the weight of evidence

4th Because the verdict is for the wrong party,

5th Because there is no cause of action shown by the pleadings against this defendant,

Lucien Paton, Atty for Hynes,

Which motion the Court overruled & deft. Hynes duly excepted at the moment.

Thereafter, & in due season, deft. Hynes further filed his motion in arrest of judgment, in words & figures as follows, to wit:

26 M. D. Heltzell } In the Law Commissioner's
Mo. in " Court,
arrest of Nicholas Walton &
judgt. William R. Hynes } St. Louis County,

Now comes said Wm R Hynes & moves the Court to arrest the judgment in this cause as against him & the property described in the petition, for these reasons;

1st Because said petition does not state facts sufficient to constitute a cause of action against this defendant, or allege the facts necessary for securing a lien on said property, in this, to wit;

A. It does not state that ten days notice of plaintiff's claim, or any notice was given this defendant prior to the filing of the claim of lien with the Clerk of the St Louis Land Court,

B. It does not allege that the materials sued for were furnished for the very buildings described, or on their credit,

C. It does not allege that Walton was a contractor with this defendant in the erection of said buildings,

D. It does not show that the materials in question were furnished to Walton,

E. It does not show when the account accrued & became due.

2nd Because said petition shows plaintiff did not have a cause of action & could not state

27 facts necessary for securing a lien, in this court; that said petition avers service of notice (if any notice) less than ten days prior to the filing of said demand & lien with said Clerk,

Lucien Eaton,
Atty for deft, Wm R Hynes

Which motion the Court overruled & deft. Hynes then duly excepted at the moment,

Now, that the above facts may become of Record, deft. Hynes tenders this his bill of exceptions & prays the Court to sign & seal the same, which is done,

A. Duesenbury
Law Commissioner {Seal}

State of Missouri
County of St Louis } ss

I, N. C. Huffman, Clerk of the Law Commissioners Court of St Louis County, certify the foregoing to be a true transcript of the Record & proceedings in the above entitled cause as the same now remain on file & of Record in my Office,

In witness of which I hereunto subscribe my name and affix the seal of said Court, at office in the City of St Louis Sept. 22, 1862,

N. C. Huffman, Clerk

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March T. 1863

M. D. Heltzell
Respondent

vs. } Transcript

Wm R. Hynes and
Nicholas Walton.
Appellants

Filed Septr 26. 1862
A W Mead Jr

Appeal to Supreme Court
From
Law Commis Court

Wise, for Respondent
Eaton " Appellant

$10 paid by Atty Eaton

Transcript 7.50
F. & seal .50
$10 Paid by appellant

Amt of errors filed Oct 2 1862
1865 March 21 Submitted on Brief
1865 March 28. Submitted on Brief
1865 April 24. Reversed and Remanded. Opinion filed Dp Brief

M. D. Heltzell
Pltff.
vs.
Wm R. Hynes & al
Defts

IN SUPREME COURT,
Oct. TERM, 1862

AND now come the said Wm R Hynes and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Hynes assigns 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 Deft Hynes
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 Deft Hynes
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 Deft Hynes
10. That said Court overruled the motion for a new trial, made by Deft. Hynes

Lucien Eaton

And now come the Heltzell appellee and for joinder in error say, that there is no error in the record and proceedings of said ~~Cause~~ Court in said cause, as assigned by said Defendants appellant

Isaac T. Wise
Atty for appellee

Heltzell vs Hines

Assignment of errors

Filed October 2. 1862

Andrew W. Mead

Clerk

Michael D Heltrell } In the Supreme Court.
vs
Wm R Hynes & Nicholas Walton } Appeal from the Law Commissioners Court.

Statement and points of M D Heltrell plaintiff appellee.

This was a suit on a Mechanics Lien brought by Heltrell, against the defendants. and wherein he obtained a Judgment for the sum of $151.53. against the defendants. which was a personal judgment against them as well also as a Judgment to be enforced upon a Lien. upon certain real property as therein (in the petition described).
Upon the evidence the Court sitting as a Jury rendered Judgment for said amount against the defendants. as it had a right to do under the statute.

Statutes 1857. pg 668-70. §13.

1 The fact that notice was served on the 28 day of June and Lien filed on the 6th. day of July following. is no ground of reversal. The effect would be simply to make the filing of the ~~deed~~ Lien premature = and it would simply take effect at the proper time - but the Lien would not thereby be lost - as such an irregularity could not effect any detriment to the defendants.

2 Again - If the said irregularity had been of vital importance it appeared upon the face of the petition. and could have been taken advantage of by motion or ~~on~~ by demurrer - this is not done - but the defendant comes in and answers to every allegation of the plaintiff = as he admits in his brief filed - except that of ownership. whereby he waives any

defect in the notice.

3. It may be urged that this is a defect ~~to~~ in the notice of the Lien - but not a defect to the service of notice of the Suit brought upon the Lien - while this is in fact the Case still the analogy between this and notice generally is none the less Complete - and as stated before - any objection which might have been taken has been lost by answering.

4 In the petition while it is stated that Hynes is the owner and Walton the Contractor, (which was indispensible to secure a Judgment on the Lien) yet they are also sued as Codefendants., in assumpsit, and the evidence goes to show that Hynes regarded himself liable. and the Judgment was rendered against both. which the Supreme Court will not interfere with.. according to numerous decisions. of ~~said~~ this Court.

5. It will appear from the record that the Judgment was just and for the right party to the Suit - that Hynes had the full benefit of the property - that he has never paid any one for it (for it is to be presumed that if he had paid Walton or any one else for the said property, he would have made that fact appear by ~~a~~ proof to that effect) and the Court will not interfere upon a finding of fact upon evidence.

6. The point urged by the defendant Hynes. that there was an unnecessary delay in serving an alias writ. as also in having such a writ issued ~~with~~ at the subsquent term, and that three or four terms of Court Elapsed before such writ was finally issued has no legal significance from the following facts. and presumptions thereupon.

First. That an original writ was issued & returned by the

marshall, "not found"

Which makes the presumption that defendant could not be served either personally or leaving a copy - in other words that he was beyond the jurisdiction of the Court.

Second. It is a presumption That if he had sooner returned within said jurisdiction an alias writ would have been sooner applied for. as it is to be presumed that unless the plaintiff had desired & sought to serve him with a writ he would not have brought suit against him.

Third. That as the return not found raises the presumption of his absence - so it remains = until proof of the Contrary is made by him - especially as he has set it up as a defense in his answer = but offered no proof thereof on trial.

three terms were lost however not four as stated in Defts brief.

The Judgment being for the right party should be affirmed.

Isaac. T. Wise
for Pl.

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Mr D Heltrell
vs
Wm R Hynes
n Walton,

Appellee, Statement
& points.

Isaac T. Wise
atty for Appellee

Filed Oct. 26th 1864

A. W. Mead
Clk

Michael D. Keltzell Respt
v
Wm R. Hynes applt.
(impleaded with Nicholas Walton)

In the Supreme Court

Appeal from the Law Commissioner.—

Appellant Hynes' statement of the case.

This was a suit on a Mechanic's lien.

Petition filed July 16th 1861.

Nicholas Walton was the Contractor: Wm R. Hynes was owner of the land & buildings sought to be charged with lien.

The petition alleges that on the 14th of March 1861, the plaintiff sold and delivered to Walton the items of a bill amounting to $142 58/100, & that thereupon Walton used them in the building & completion of the buildings named in the petition. It is further alleged that said buildings belong to Hynes (at the date of suit) and that they were "built by Walton who was "the contractor for building the same, and that the "said materials furnished were furnished immediately "to James Luscomb & were thereupon incorporated "into the said buildings."

It is further alleged that an a/c. a lien was filed in the Land Court July 6th 1861, "of which he gave due notice on the 28th of June next prior."

The writ, returnable to the August term 1861, was not served as to Hynes, nor was any alias writ, or other process issued against him till the 19th of March 1862, — four full terms of Court intervening — without action on the part of Plaintiff to enforce his lien.

Deft. Hynes when served answered separately putting all the allegations of the petition distinctly in issue, except the ownership of the property.

At the trial, plaintiff offered evidence tending to show that the bill of items filed was correct.

Plff. also offered in evidence an a/c. or lien filed in the Land Court July 6, 1861, which claimed to be a "just & true a/c. of materials furnished by him & the prices thereof & as also of moneys expended in delivery of the same to "Nicholas Walton, contractor by James Luscomb, plasterer & which "entered into the construction of certain buildings belong-"ing to Wm R. Hynes" & set out the a/c. & the description of the property. The lien was signed "pr Isaac T. Wise atty," and was verified by S. L. James agent.

Deft. Hynes objected to the admission of the document because:

1st. It did not state facts to constitute a lien, in this,

A Because it did not allege that notice of intention to file lien had been given.

B It did not state that the materials were furnished for the buildings mentioned, or even to Walton.

C It did not show that Walton was contractor with any one — with Hynes more than with Luscomb.

D It did not show when the a/c. accrued.

E It did not designate sufficiently the law sought to be enforced.

F. It seeks to enforce a lien for moneys expended in delivering materials to Walton, & not at the buildings.

G. It did not show that the ground belonged to Hynes.

H. It did not show that the prices were just & reasonable, or that the materials were worth the prices charged.

The Court admitted the document in evidence & the deft. excepted.

Offr. next offered in evidence a paper as follows:

"Mr. William R. Hynes:

" You are hereby notified that
" I, the undersigned, hold a claim against the
" certain buildings owned by you also against the
" real estate appurtenant, the same, being seven
" three story brick dwelling houses situated on the north
" side of Morgan street between Beaumont st. &
" Leffingwell Avenue, said claim being for materials
" entering into the construction of said buildings,
" ~~(the materials, time of delivery & prices being as~~
" ~~follows: (here follows the bill of items)~~
" & being sold & delivered by the undersigned to James
" Luscomb, plasterer, by him used in the
" construction of said buildings, the materials, time
" of delivery, & prices being as follows;
" (here follow the items of the bill)
" and that unless ~~the~~ said claim be paid I shall
" file a lien upon said property to secure en-
" force payment of the same according to law.

Michael D. Heltzell
pr Isaac T. Wise atty &c."

There was no dispute as to delivery of a copy of this document to deft. Hynes on the 28th of June 1861.

Deft. Hynes objected to the admission of this as a notice for various reasons among them, because,

1st It was for a claim against James Luscomb & not against Walton.

2 Because it was served less than ten days prior to the date of filing of the lien.

The objections were overruled, & Deft. Hynes excepted

Deft. Hynes offered no evidence.
At the close of the evidence deft. Hynes asked for instructions,

1st That upon the pleadings & evidence, he (deft Hynes) was entitled to a verdict in his favor. This was refused -

2d That there could be no recovery against Hynes unless it appeared from the evidence in the case that the articles specified in the bill of items were furnished by pltff. to Walton expressly & purposely for the identical houses mentioned in the petition. Given.

3d That as against Hynes pltff. could not recover for the items of drayage in the account sued for. Refused.

The court sitting as a jury found for pltff. & then entered personal judgment against both defendants!

Motions for new trial & in arrest of judgment for reasons covering all the points in the case were duly made, overruled & exceptions taken.

Walton did not defend -

Deft. Hynes appealed to this court & in support of his appeal relies on these points:

1st The suit was not "without unnecessary delay". An interval of 8 months, 4 terms of court, without an effort to obtain service on Hynes was gross laches.

2d There was no cause of action for lien. The petition shows only 8 days service of notice -

3d The lien & notice were both in -

properly admitted in evidence.

The document filed as a lien did not show notice, or facts to constitute a lien on the property.

The notice related to a claim against Luscomb and Walton; - it was not on its face authorized, & it was not served in time.

4th - The plaintiff did not state a cause of action against Haynes personally, yet the Court rendered a personal judgment against him.

5th - The motions for new trial & in arrest were both well taken & should have been sustained.

6th - The 1st instruction asked by Haynes should have been given.

As on the facts the pltff. has no cause of action for a lien, or against Haynes, the judgment should be reversed as to him & not remanded.

Lucien Eaton
Atty of Haynes.

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M. D. Beltzell
vs
Wm R. Hynes &
N. Walton

Appellant's statement
& points

Lucien Eaton
atty of Hynes,

Filed April 20th 1864
A. W. Mead
Clerk

Heltzell Res.
vs
Hynes & Walton Appls

~~The Statute~~

This was a suit by the Sub-Contractor against the contractor and the owner to enforce a mechanics lien against a house in St Louis under the mechanic's lien law applicable to St. Louis County. Session acts 1857 p. ~~[illegible]~~ 668. It appears from the petition that there was an interval of eight days only between the notice of claim given by the plaintiff to Hynes the owner and the filing of the lien in the Land Court, whereas the act (§ 18) expressly requires ten days' notice before filing. The objection was taken by motion in arrest but was overruled by the Court below. In Schubert vs Crowley 33 Mo. R 564 the same question was considered by this Court where it was

held the objection was well taken.—

The court below further erred in giving a general judgment for the debt against both the contractor and the owner. There is no pretence in the petition for charging Hynes the owner ~~with~~ <u>personally</u> with the debt. The petition sought not to charge him but his property. There was therefore no foundation for the judgment as against him and it ought to have been arrested. Walkenhorst vs Coste et al 33 Mo. R. 403—

The judgment will be reversed, and as it may be possible the facts of the case may justify an amendment of the petition so as to shew a sufficient notice of claim the cause will be remanded. Judge Bay concurring

John D. S. Dryden

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Heltzelt
vs
Hynes & Walton

Opinion of Court
by Dwyden

Filed April 24. 1865
A. W. Mead
Clk

Reversed & Remanded