Gest, Mary E et al vs. Tucker, William J 1869 Pettis Co. #1 Dis. 289/6

108/5

Affirmed - lien can be enforced because property was for her use

Recovery - T trying to have lien on house enforced because

G didn't pay him for painting it

William J Tucker } Common Pleas
against } Court of Pettis
Mary E West } County Missouri
Joshua H West } Sept term 1869

Transcript to District Court

1

Be it remembered that heretofore to wit on the 16th day of April 1869 the following petition was filed in the office of the Clerk of the Common Pleas Court within and for the County of Pettis and State of Missouri which said petition is in words and figures following to wit

In the Common Pleas Court of Pettis County in the State of Missouri June term 1869

Wm J Tucker } Plaintiff
against
Mary E Gist and
Joshua S Gist } Defendants

The plaintiff states that heretofore viz. on the 13th day of October 1868 the defendants were for a long time had been and now are husband and wife

That the account filed herewith as an Exhibit and marked "A" is a just and true account of the demand due plaintiff from the defendants Mary E Gist for materials furnished and work done in painting graining and glazing her dwelling house herein after discribed after all just credits and off sets have been given thereto and the balance of one hundred and eighty five dollars thereon is due and unpaid plaintiff

Plaintiff further states that the last items charged for in said account was rendered less than six months prior to the third day of April 1869 viz. On the 13th day of October 1868 that the said work done

2)

and Materials furnished as charged in said account were rendered by him to the said defendant Mary E Gist as an Original Contractor with him and was expended upon her dwelling house all of which was done by and with the knowledge and Consent of the said defendant Joshua H Gist that said dwelling house is a Story and a half high in front built of New Material with an and one Story addition in the rear has two porches has Six doors and Twelve windows on the out Side on the first floor and three windows and three doors on the Out Side on the Second floor and has altogether Six inside doors Said dwelling is now used occupied and owned by the defendants and Situated on the west Side of her farm which is Situated in the County of Pettis and State of Missouri and discribed as follows Viz" the SW 1/4 of NW 1/4 and NW 1/4 of SW 1/4 of Section 34 and NE 1/4 of SE 1/4 of Section 33 in town ship 45 and range 23

The plaintiff States that within Six Months after said work was done and the Materials furnished as charged for in said account Viz" on the 3d day of April 1869 he did file with the Clerk of the Circuit Court of the proper County Viz" Pettis County a Just and true account then of after all Just Credits had been given for the purpose of procuring and establishing a lien upon the above described House and ground upon which the Same was Situated Verified by her own affidavit and Containing a True description of the property upon which this lien intended to apply together with the Names of the original Contractor Viz" this plaintiff and that Ninety days have not

3

Expired Since the filing of Said account and affidavit Wherefore the plaintiff States that an action hath accrued to him to have and recover from the defendants the Sum of one hundred and eighty five dollars together with Six per Cent interest thereon from the Said 13th day of October 1868 and he asks the Court upon the final hearing of this Cause to order adjudge and decree that this plaintiff have Judgment and execution for the Said Sum of one hundred and eighty five dollars together with the interest thereon and that the dwelling house herein discribed together with the ground upon which the Same is Situated to the extent of one acre May be Sub jected to her lien as herein before Stated and Sold to Satisfy the Sum together with the Costs of this proceeding

John Montgomery Jr

The following is a Copy of the exhibit Marked "A" as referred to in the foregoing petition

Mrs Mary E Gist
To Wm J Tucker

"A"

To furnishing glass and paints also painting graining and glazing house $210.00

By Cash 25.00

Bal due $185.00

State of Missouri }
County of Pettis } ss

This affiant Wm J Tucker being duly Sworn on his oath States that the within account attached hereto against Mary E Gist is a just and true

4 "a"

account due him from the Said Mary E Gish for Materials furnished and work done in painting graining and glazing her dwelling house herein after described after all Just Credits have been given thereto and that the balance thereon of one hundred and eighty five dollars is due and unpaid him

This affiant further States that the last item charged for in Said account was rendered less than Six Months prior to this time to wit on the 13th day of October 1868 that the Said work done and Materials furnished as charged in Said account were rendered by him to the Said Mary E Gish as an original Contractor with her and was expended upon her dwelling house that the Said dwelling house is a Story and a half high in front built of New Material with a one Story addition in the rear has Two porches has Six doors and Twelve windows on the out side on the first floor and three windows and three doors on the Out side on the Second floor and has altogether Six inside doors

Said dwelling is now used Occupied and owned by the Said Mary E Gish and her husband and Situated in the west Side of their farm which is Situated in the County of Pettis and State of Missouri and described as follows Viz. The SW 1/4 of NW 1/4 NW 1/4 of SW 1/4 of Section 34 and NE 1/4 of SE 1/4 of Section 33 in township 45 and range 23

This affiant further States that he Makes this affidavit and files it together with the account for the purpose of procuring

5)
"a"

and establishing a lien upon said dwelling house and the ground upon which it is situated for the amount of his said account in accordance with and under the provision of Chapter 195 of the revised Statutes of the state of Missouri of the year 1865

W J Tucker

Subscribed and Sworn to before me this 3rd day of April 1869

Lucien Montgomery Clk
By Washburn D C

And afterwards to wit on the 25th day of June 1869 it being during the Session of the June term of Said Common pleas Court the following among other proceedings was had and held and entered on the records of Said Court

W J Tucker
against
Mary E Gist and
Joshua H Gist

Now on this day Comes the defendant Joshua H Gist by his attorney and files his Separate answer herein The defendant Mary E Gist Comes by her attorney and files her demurrer to plaintiffs petition
Which Said answer is in words and figures as follows to wit

In the Common pleas Court

State of Missouri }
County of Pettis }

Wm J Tucker } Plaintiff
against
Mary E and Joshua Gist } Defendants

6)

Said defendant Joshua Gest for his Seperate answer to plaintiffs petition = Says that he has no Knowledge or Information Sufficient to form a belief that the account filed with the Said petition is Just true and Correct defendant denies that there is a balance of one hundred and eighty five dollars due plaintiff defendant denies that Said work and Materials furnished as charged in Said account were rendered by plaintiff to him defendant denies that he is the owner of Said property described in said petition

defendant denies that plaintiff Should have Judgment and execution for the Sum of one hundred and eighty five dollars and interest

defendant denies that Said dwelling house and One acre of ground Should be Subjected to plaintiffs lien and Sold to Satisfy the Same

defendant having fully answered prays to go hence with his Costs

Crandall and Sinnet
attys for deft

(Copy of Demurrer)

Which Said demurrer is in words and figures as follows to wit

In the Common Pleas Court

State of Ills
County of Pettis

Wm J Tucker — Plaintiff
against
Mary E Gest — Defendants
Joshua H Gest her husband

Now Comes defendant Mary E Gest and demurs to plaintiffs petition for the following

7

Reasons 1 because said petition does not State facts Sufficient to Constitute a Cause of action in that it seeks to obtain a Judgment enforcing a Mechanics lien against the property of this defendant a Married Woman but does not State that said property is the Sole and Seperate property of this defendant Or that She had the power or Capacity to Charge the Same for the payment of any of her debts 2d because said petition avers that the Contract referred to was Made by and with this defendant a Married woman but does not Show that the Same Was Made in writing or that She had any power or Capacity to Make a Contract that will bind Said property 3d because The Court has No Jurisdiction of the person of this defendant in that this action being to enforce a Mechanics lien is an action at law and Cannot be Maintained against this defendant She being a Married woman =

Crandall and Sinnet
Attys for Deft

And afterwards to wit on the 29th day of June A D 1869 It being the day of adjournment of the Said Common pleas Court the following entry appears on the records thereof

It is ordered by the Court that all Cases not otherwise disposed of be Continued generally

And afterwards to wit on the 24th day of September A D 1869 it being during the Session of the September Term 1869 of Said Common pleas Court present Hon John G Cochran Judge Bacon Montgomery Clerk Wm P Paff Sheriff the following among other proceedings Was had and held and entered on the records of Said Court

towit

Wm J Tucker } ~~Plaintiff~~

against

Mary E and Joshua N Gist } ~~Defendants~~

Now on this day the demurrer heretofore filed in this Cause is taken up by the Court and after being seen and heard is by the Court Sustained Whereupon Comes the plaintiff by his attorney and takes Non Suit with leave to Move to Set the Same aside

And afterward towit on the 25th day of September during the Same Session of Said Court the following among other proceedings was had and held and entered on the records of Said Court to wit

Wm J Tucker }

against

Mary E and Joshua N Gist }

Now on this day Comes the plaintiff by his attorney and files his Motion to Set aside Non Suit which Motion is in words and figures as follows Towit

In the Common Pleas Court Pettis County Missouri September Term 1869

Wm J Tucker } Plaintiff

against

Mary E Gist and Joshua N Gist } Defendants

Now on this day Comes the plaintiff and Moves the Court to Set aside the Judgment of Non Suit

9 Rendered in the above entitled Cause for the following reasons "Viz"

Because the Court erred in Sustaining the demurrer of the defendant Mary E Gist to plaintiffs petition

Because the plaintiffs petition is good and Sufficient and Contains facts Sufficient to Constitute a Cause of action against the defendant

Jno Montgomery Jr
Atty pltff

Which Said Motion is taken up by the Court by Consent of parties and after being Seen and heard is by the Court Overruled to which ruling of the Court the plaintiff duly excepts

And afterwards to wit on the 27th day of September A D 1869 during the Same Session of Said Court the following amongst other proceedings was had and heard and entered on the records of Said Court to wit

Wm J Tucker } Plaintiff
against
Mary E and Joshua H Gist } Defendants

Now on this day Comes plaintiff by his attorney and files his bill of exceptions herein which Said bill of exceptions is in words and figures as follows to wit

In the Common pleas Court of Pettis Co
In the State of Missouri
September term 1869

Wm J Tucker } Plaintiff
against

10)

Mary E Gest and
Joshua S Gest } Defendants

Be it remembered that at the September term 1869 of the Court aforesaid the defendant Mary E Gest filed the following demurrer to plaintiffs petition in this Cause (for Copy of demurrer See pages 6+7) Which demurrer Coming on to be heard was by the Court Sustained to which action of the Court to which action of the Court plaintiff at the time excepted

Plaintiff then took Judgment of Non Suit with leave of the Court to Move to Set same aside and at the Same term of the Court and on the day thereof plaintiff filed the following Motion to Set aside said Judgment of Non suit Which Said Motion was in words and figures as follows "Viz" (For Copy of Motion See pages 8+9)

Which Said Motion was by the Court overruled to which action and ruling of the Court the plaintiff at the excepted and tenders this his bill of exceptions which he prays May be Signed Sealed and Made part of the record in this Cause which is Now here accordingly done

Given under My hand + Seal this 27th day of September 1869

John S Cochran
Judge

State of Missouri }
County of Pettis } ss

I Bacon Montgomery Clerk of the Common Pleas Court within and for said County + State do hereby Certify that the above and foregoing is a true + Complete Transcript of the Record

11 and proceedings in the Cause therein William J Tucker is Plaintiff and Mary E Gest & Joshua H Gest are defendants as fully as the same appears of Record & on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said Court. Done at office in the City of Sedalia this 9th day of November AD 1869 Bacon Montgomery Clerk

By W F Barrett DC

Index to Transcript

Pages	1. 2 & 3 Plaintiffs Petition
"	3. 4 & 5. Exhibit "A"
"	5 & 6 Separate answer Joshua H Gest
"	6 & 7 Demurrer Mary E Gest
"	7 Continuance
"	8 Demurrer taken opd sustained Pltff takes non suit.
"	8 & 9 Motion set aside non suit.
"	9 Motion overruled
"	9 & 10 Bill of Exceptions.

In The Common Pleas Court
Of Pettis County Missouri

William J. Tucker Plaintiff
against
Mary E Gest and
Joshua H. Gest her husband Defendants

To the above named Defendants or their attorneys of Record—

Take notice that the abovenamed Plaintiffs have sued out from the First District Court of the State of Missouri a writ of error in the above entitled cause returnable to the next December Term of said District Court to be held at Jefferson City Missouri on the first Monday in December 1869, when & where you can appear or not at your pleasure

Ina Montgomery Jr
Atty for Plaintiff

We Crandall & Sinnett Attorneys of Record for the within named Defendant hereby acknowledge service of the within notice this 10th day of November 1869 in Pettis County Missouri.

Crandall & Sinnett
Attys for Deft.

The State of Missouri, ss.

The State of Missouri, *To the Judge of the* Common Pleas Court of Pettis County, *in said State,* Greeting:

Whereas, *In the record and proceedings in a certain cause lately pending in the* Common Pleas Court of Pettis County, *wherein* Wm. J. Tucker was Plaintiff, And Mary E. Gest and Joshua H. Gest her husband were Defendants, *in an action of* enforcement of a Mechanics Lien *manifest error hath intervened to the great damage of the said* Plaintiff, *as by* his *complaint we are informed.*

Now, *we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, command you, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said court, so that we may have them before us at our First District Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the first Monday in* December *next, so that our Judges of our First District Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done, and have you then and there this writ.*

Witness, WM. R. HOPKINS, *Clerk of our said First District Court at office, in the City of Jefferson, the* 8th *day of* November *in the year of our Lord one thousand eight hundred and* Sixty Nine.

Wm. R. Hopkins
Clerk

$10 - paid by
Jno. Montgomery Jr.

State of Missouri
County of Pettis

I

Bacon Montgomery
Clerk of the Common
Pleas Court within
& for said County &
State do hereby Certify
that the within Writ
was received by me
on the 9th day of
November AD 1869
and in obedience to
the order therein I
have made out a
full & Complete Transcript
in Cause of Wm J Tucker
vs M E & J H Gest &
herewith forward the
same to Dist Clerk at
Jefferson City

Bacon Montgomery Clerk
B Bassett DC

Case No. 43

Wm. J. Tucker P.E.
vs
Mary E. Gest et al D.E.

Error to Pettis

Filed Nov 19th 1869
Wm. R. Hopkins
Clerk

Fee $10.–
Paid

The State of Missouri, ss.

THE STATE OF MISSOURI, To the Judges of the First District Court in said State, GREETING:

Whereas, In the record and proceedings in a certain cause lately pending in the First District Court of said State wherein W. J. Tucker was plaintiff and J. H. Guest and others were defendants

in an action of manifest error hath intervened to the great damage of the said as by complaint, we are informed.

Now, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the County of Cole, in said State, on the First Monday in July next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law ought to be done, and have then and there this writ.

WITNESS, N. C. BURCH, Clerk of our said Supreme Court, with the seal thereof hereto affixed, at office, in the City of Jefferson, this 9th day of March, in the year of our Lord one thousand eight hundred and Seventy.

N. C. Burch
Clerk

Clerk's fee of $10 paid by Johnson & Budd

State of Missouri } Set.

I Wm. R. Hopkins Clerk of the District Court within and for the First Judicial District in the State of Missouri, hereby return the within Writ duly executed, as appears from the annexed Transcript.

Witness my hand and the Seal of said Court at Office in the City of Jefferson this 2nd. day of May A.D. 1870

Wm. R. Hopkins
Clerk.

Wm J. Tucker, Pl. Er.

1 "

Mary E. and J. H. Geet Df. Er.

Error to Pettis Com. Pleas.

Plaintiff here sues for the enforcement of a Mechanics lien, against the property of a Married woman, held by her in fee and the husband is made co-defendant.

The contract was made with the wife, by and with the knowledge and consent of the husband. The Court below sustained a demurrer to the petition, upon the ground that a Married woman could not make a valid contract whereby she could be sued at law as a feme sole, and her property so held in fee subjected to the payments of such debts. The defendants had Judgt. on the demurrer, and the case is brought here by error. The settlement of this question depends solely upon the meaning of the 21st Sec. of the Mechanics lien law which reads as follows: "Every person including all cestui que trust, for whose immediate use, enjoyment or benefit, any building erection or improvement shall be made, shall be included by the words "owner or proprietor" thereof, not excepting such as may be infants over the age of Eighteen years, or Married women".

I find no similar provision to this in any other State, and hence we are as-certain from the section itself what is meant by the language used. The argument of the counsel for the defense and their authorities all have reference to the common law rules relating to Married women. The decisions cited are upon different

Statutes from this, None of them go to the extent that this Section
2 does, if we are to take it for what it seems to say. The defense admit
that this Section has enlarged the rights and liabilities of Married Women
but only to the extent that they can make valid contracts whereby they
may be sued at law when they own Seperate Estates. It is insisted,
that as the husband must join in the wifes deed, that therefore, she
ought not to be permitted to do by contract what she cannot do by
deed. I cannot see the force of this argument. There are to my mind,
many good reasons why a Married woman should not be permitted to
dispose of her real estate without her husband joining in the deed, and
equally as many good reasons why she should be sued at law upon
her contracts and her property sold to satisfy the debts she contracts
in the immediate improvement of such property. But the law referred
to in the conveyance of estates does not say whether it is the sep=
erate estate of the wife or not, it simply says her "real estate". And
the practice has always been to have the husband join in either
kind of estate,

But wherefore the reason, that a Married woman may be sued at
law on her contracts as to one class of property and not the other?
If the rules that have always given Courts of Equity, alone, power
to deal with her and her property have been changed by this
Section, and she is now permitted to contract as a feme sole be
be sued at law and her seperate estate charged with the lien;
why may she not as well be subject in the same way as to
her fee estate? If the argument used here, that Courts of
Equity, are essential to protect her in the enjoyment of her rights
it certainly should be consistent with itself, and not draw distinc
tions without a difference,

I think it cannot be doubted that this section makes Married
3 women "owners". Nor will it be denied that the legislature has the power to make this change, And I am clearly of the opinion, that if married women have been included as owners, that no distinction is to be drawn, or inferred from the language of the law, as to what kind of estate they have, whether in fee or a separate estate, And why include "infants"? They should certainly have as much consideration as married women who hold Estates in fee! And again; I think there is yet a stronger reason than any other for the position we take, And that is; that prior to the introduction of this 21st. Section, only those who held a legal estate were considered "owners" under this lien law. But this section has included Equitable owners, Married women and infants over eighteen, The first sec. of the law says "owner or proprietor, their agent or trustee". Here then we find only legal owners. At least we are not at liberty to say that one holding other than a legal title shall be included. The 4th sec. provides for lease=holders another class of legal owners, and these are all. Then the 21st sec. was introduced into the law, whereby equitable owners should be included, And the very fact of these three classes mentioned in the 21st sec. being since included, is of itself sufficient to establish the fact that before its introduction only those having legal title were considered owners, for it brings in equitable owners and others not before provided for, Therefore, as the law stood before this sec. there was no redress for the man who built a house upon the fee estate of a Married woman, She could not be sued upon her contract nor could you, if you contracted with her husband, sue him, he not having a legal title, And even now,

the husband of a Married Woman, who has an estate in fee,
4 would not be liable, - that is, no lien would attach to such prop=
erty by virtue of a contract with him, unless he acted as the agent
of the wife. I can see good reasons for the interpretation of this
Sec, so as to hold Married Women liable, and I think without
any forced or unnatural construction. I think while laws are
made to protect Married Women, at the same time they should
not be so enacted, or construed, as to be unjust and oppressive to
others. A large amount of landed property in this State is held by
Married Women, a larger proportion of the men are living with
their wives than ever before, and while I have no fault to find
with this system of Management, yet some one should be respon=
sible for the debts of every family, and when debts are contracted
upon the face of property; when the estate itself is improved and
made valuable, the laws should be so made, that this property
could be reached in some way. And without this 21st Sec. which
I think was expressly intended for this salutary purpose - the hus=
band or the wife might either make the contract in just such a
case, and there would be no remedy. But I find the petition
is defective in not stating that the work & labor done &c. was
done for the "immediate use, enjoyment or benefit" of the owner.
And in order that full justice may be done, the judgment of the
Court below is reversed, and the cause remanded, with
leave to the plaintiff to amend his petition in conformity with
these views.

The Other Judges concur.

Chas. P. Townsley.

State of Nipomi
County of Cole } ss.

I. William R. Hopkins Clerk of the District Court within and for the First District of the State of Nipomi do hereby certify the above and foregoing to be a true full and complete copy of the opinion of the Court, delivered in the above entitled cause wherein Wm. J. Tucker is plaintiff in Error and Mary E. and J. H. Best defendants in Error as the same remains on file in my said office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said Court at office in the City of Jefferson this 2nd day of May A. D. 1870.

Wm R. Hopkins.
Clerk

Fees Due Wm. R. Hopkins. Clerk District Court.

Copy of Opinion	$2.00
Two Cert of Seal	1.00
	$3.00

In the Supreme Court at
Jefferson City Missouri
July Term 1870

William J. Tucker } Deft in Error
vs
Mary E. Gest &
Joshua H. Gest } Pltff in Error

Now on this day comes plaintiffs in error by their said attorneys, and say that in the record and proceedings and also in the giving of judgment aforesaid by the said 1st District Court, there is manifest error to wit

That in the petition aforesaid and the matters therein contained are not sufficient in law to maintain this action

There is also error in this to wit that by the record aforesaid it appears that judgement was given for the said William J Tucker ~~when~~ whereas by the law of the land it should have been given for the said Mary E. Gest & Joshua H Gest and against said Tucker

And the said plaintiffs in error pray that the judgement aforesaid may be reversed and annulled and that they be restored to all they have lost by said judgement

Joinder in Error
Jno Montgomery Jr
Atty for Dfdt in Error.

Crandall & Sennet for Pltff in Error

Wm J. Tucker
vs
Mary E & J H Gist

Assignment of
Error

Filed July 11/70
Burch ck

✓ 39

To. The Supreme Court
July Term, 1870.

William J. Tucker Defendant in Error.
Against
Mary E. Gest and
Joshua H. Gest her husband Plaintiff in Error.
Error to District Court.

This is an action for the enforcement of a Mechanic's lien commenced by the Defendant in Error in the Common Pleas Court of Pettis County - at June Term 1869. -

The petition alleges substantially that on or before the 18th day of October 1868. the Defendants were and still are husband and wife -

That the account filed as an exhibit with the petition is a just and correct account of the demand due the Plaintiff from the Defendant Mary E. for materials furnished and work done in improving her dwelling house thereafter described. After all just credits and set-offs have been given thereto. and that the balance of the $185.00 thereon is due and unpaid Plaintiff - That the last item charged for in said account was rendered. let than six months prior to the 8th of April 1869. (the date of the

Wm J. Tucker Def. in Error
vs.
Mary E. Gest et al.
Plaintiffs in Error

Statement of Def. in Error

In the Supreme Court
At Jefferson City Missouri
July Term 1870

William J Tucker } Deft in Error
vs
Mary E Gest &
Joshua H. Gest } Plff in Error

Appellant's Brief
By Crandall & Sinnet

I We contend for appellant that the petition does not state facts sufficient to constitute a cause of action and the demurrer was properly sustained by the Common Pleas Court. The petition states that the contract for the work done and material furnished for the erection of improvements on the land in question was made by Mary E. Gest a married woman. Now in order to give a lien the contract must be such as can be enforced at common law. Houck on Mec Liens 233. Kirby vs Lead & wife 13 Met. 149 and if either party be incapacitated the contract or agreement is futile and unavailing. Houck on Mec Lein 233. 2 Black Com. 114. Chitty on Con. 4. 5. & 29. and it is a well established rule of law that a wife cannot bind herself by an executory

contract, Reeves Dom Rel. 182, 2 Kent Com 150., 7 Conn 224. 3 Mo. 254, 40 Mo. 61. 6 Wend 11, 4 N.Y. 9. 12 B Mon 665.

II The lien is created by statute, as incident to the contract, and when there is no valid contract there can be no lien. Houck on Mec Lien 233., 13. Met. 149., Sibley & Meeks vs Casey et al 6 Mo. 164. and Mrs Gest being unable to make a valid contract the lien cannot be enforced.

III The petition charges that the real estate against which this lien is attempted to be enforced is held by the wife in fee simple, This is not her sole and separate property, 4 N.Y. 9. 28 Mo 557 40 Mo. 61. and cannot be conveyed or encumbered by the wife except by deed executed jointly with her husband. R.C. 1865 p. 444, Sec 2.

IV Courts of equity take jurisdiction of the sole property of married women ~~but~~ and will enforce her contracts against her sole and separate property, but courts of law never do; and this

being an action at law cannot be maintained against defendant Mary, 3 Mo. 254, 40 Mo. 61, 6 Wend 11, 4 Hy 9, Nor can a Court of chancery assume jurisdiction of this case, for the property against which the lien is sought to be enforced, is not such property as courts of equity will enforce her ~~and~~ contracts against

See authorities above cited.

V This being the settled doctrine at Common law it only remains to be seen whether any innovation or or change has been made by our Statute, It is contended on the part of plaintiff that the 21st sec of Chapter 195, R.C. 1865, changes the common law in this respect and grants liens in such cases as this, We do not deny but a lien may be enforced against the separate property of a married woman or minor over 18 years of age under that section, but we deny that property held by the wife in fee, in which her husband has a life estate, and in possession of and enjoying all the rents and profits arising therefrom as in this case, is in the least effected by it, Section 1 of the same act covers such property as this, and

39

Wm J. Lucken
vs
Mary E. & J. A. Gest

Statement & Brief
by Crandall & Lennett
for Appellant

Filed July 11/70
Burch
Clk

William J. Tucker Defendant in Error.
against
Mary E. Gesh Et al. Plaintiffs in Error.

Brief of Ira Montgomery Jr for
Defendant in Error.

The decision of the questions involved in this case, in my mind depend solely upon the construction which may be placed upon the 21st Sec. of Chapter 195 of the Revised Statutes of 1865. This Section reads as follows.

"Every person, including all cestui que trusts, for whose immediate use enjoyment or benefit, any building erection or improvement shall be made, shall be included by the words owner or prietor thereof under this chapter, not excepting such as may be minors over the age of eighteen years or married women"

The grounds of the Demurrer are that this is an action seeking to obtain a Judgement against the property of a married & does not allege that the property sought to be charged is her sole and seperate property, or that she had the power to charge the same for the payment of her debts. And that the contract referred to was made with a married woman, & not in writing & void-

Does the 21st Section authorize the enforcement of a Mechanics lien against the property of married women?

There seems to my mind but one reasonable construction of this section, and that is, that by this section the Legislature intended to place Married Women upon the same footing as any other persons having buildings or improvements made upon their property. Especial mention is made in this section that Every person, for whose immediate use enjoyment or benefit any improvements are made shall be included in the words Owner or proprietor wherever they occur in the chapter, not excepting married women. The exception as to married women seems to have been especially added to the section for fear that the words "Every person" might not be understood & construed in the broad sense it was intended.

The Counsel for the Plaintiffs in error have argued that married women, as mentioned in this section are spoken of only in the relation of Cestui Que Trusts, and that it was intended only to charge property which they held by or through Trustees, but a careful analysis of the sentence must lead to a different conclusion. If their idea is correct why are the words

"including all Cestui Que Trusts," used after the words "Every person" as they are? And why say "excepting such as are minors over the age of eighteen." Do they mean minor Cestui Que Trust over the age of "Eighteen years." It certainly would be making our Legislature enact a very strange & peculiar distinction to give this significance to the words used. The word "Person" was undoubtedly intended as the noun nominative to "shall be included" & the clause about Cestui Que Trusts thrown in to qualify the noun & give it a greater & broader significance than might attach if it remained unexplained.

Granting the construction we give this section how far does the section go in giving the right to sue married women upon a contract made for improvements.

The first section of the act says "Every mechanic or other person who shall do or perform any work or labor upon or furnish any materials x x x for any building x x x under or by virtue of any contract with the owner or proprietor thereof x x x shall have a lien &c &c. The 21st Sec. says married women shall be included in the words owner or proprietor wherever they occur in the Chapter.

Now applying them together have

we not a special provision of our Statute authorizing the contract. At Common Law it is well understood such a contract viz with a feme covert, is void, but this section of our Statute legalizes such contracts, & places under liability to Mechanics liens all property upon which they have expended their time & labor. All through the act the words owners & proprietor are used. & all distinction between married women & any other persons are removed, so far as the right to the lien is concerned.

Before the enactment of this 21st section only those holding legal estate & competent to make valid contracts at law were included in the words owner or proprietor under the lien law. This section includes equitable owners, married women & infants. The first section says Owners or proprietors their agents or trustees, only legal owners & the 4th section which provides for lease-holders yet only legal owners. And these are all without the 21st section which introduces & includes equitable owners, minors & married women. The fact that these classes mentioned in the 21st section have been since included in the lien law should be sufficient of itself to establish the fact that before its introduction only those holding legal titles were chargeable

for this section brings in Equitable owners & others not before provided for, & makes them liable the same as any others.

Then what difference can it make how the married women holds the estate whether the legal title or separate estate ~~or in fee~~? If chargeable at all under this law why not as well as to one class of property as another. Whatever would come under the meaning of Owner or proprietor & these words touch some time a very small interest.

In a case very similar to this in some respects, Denis J. says.

"Her title to her estate had also by force of the law of 1849 become a legal one. She held as if she were unmarried & the intervention of trustees was not required. Then the lien law was pass which subjected all owners of buildings to a lien to secure the performance of contracts for their construction & repairs. There was no exception in terms in favor of married women & there is none in the nature of the case or in reason policy or convenience, under the power conferred by Act of 1849 x x x they may mortgage & convey their real estate x x. When therefore a general statute gives a lien against all owners who shall become parties to certain contracts, married women as well as unmarried one & & men are embraced"

20th U. Y. Rep. 247
Hauptman v. Collins

We may say in the case ah bar as the learned Judge did in the above, that under our statutes married women may hold the legal title without the intervention of trustees. In New York she did not need the consent of her husband to convey her realty nor to charge it with a mechanics lien. In our state she only needs the consent of her husband evidenced by a joinder in the deed to convey her legal estate & charge it with a lien. The petition in this cause states that the contract building &ca was done by & with the knowledge & consent of her husband.

In the above decision Denis Jr decides that the lien is good notwithstanding the statutes does not give it specifically against married women

Also refer to Greenough vs Wigginton & wife
2 Greene Iowa Rep. 435.

The Mechanics Lien law, having been created to supply a defect in the Common Law, which experience soon discovered to our law makers & being remedial in its nature, is entitled to a liberal construction.

This Court, in Patrick against Ballentine 22 Mo 148 in speaking of the

construction of this law say "The act must be construed so as to render the greatest amount of benefit to those for whose interest it was made & at the same time to save from injury the other class of persons upon whom it operates as far as practicable."

If this act be construed to include married women how can it affect them injuriously? The contract must be made, & before the lien enforced a court must pass upon it. They have perfect protection in the laws of the land against any injury such construction as we contend for might be thought to give against them.

But how is it with the Mechanic. Consider that very many well to do men in this age have the legal title to all their real estate vested in their wives. We might say that the title to 1/3 of all of our lands are in Women & Married women. Generally the husbands of these women who own the property acting as the agent for the wife either openly as such or ready to claim the agency when occasion may demand, do the contracting. The Mechanic views the property. Thinks it good for his lien work & spends time labor & material in improving the property of

the wife & finds when he attempts it no redress in the law. The very object of the law is the protection of Mechanics, and if there is possibly any class of people more than others against whom they need protection it is these married women who hold the legal title to all the property & board & support their husbands.

The property not bound although improved The husband insolvent!! Such would be the injuries which would result to the Mechanics were their Lien law decided not to include married women, The Mechanics Lien is always favored in Law

Tuttle vs Montford 4th California 360.

There is no pretense I believe that the petition does not state all the necessary facts for the enforcement of the lien, if it can be enforced at all against married women At least no question has been raised by the Counsel for Pltf in Error, and I am unable to discover any defects in it unless it be that referred to in the opinion of the District Court, In that opinion Judge Townsley remarks that the petition is defective in not alleging that the work and labor done was for the immediate use enjoyment & benefit of the owner.

It is not alleged in those words but is expressed substantially in the petition, and I presume this is all that is required. Anyway it was never raised until Judge Towneley pointed it out. I am only hope this court may regard it & treat it as he did.

39

Wm L. Tucker Dft in Error

against

Mary E. Lesh et al

Pltffs in Error

Brief of Atty for

Dft in Error

Filed July 11/70

Burch Clerk

In the Supreme Court
July Term 1870

William J. Tucker Defendant in Error.
against
Mary E. Geat and
Joshua H. Geat her husband Plaintiffs in Error.
Error to 1st District Court

This is an action for the enforcement of a mechanics lien commenced by the Defendant in Error in the Common Pleas Court of Pettis County at June Term 1869.

The petition alleges substantially that on & before the 13th day of October 1868 the Defendants were & still are husband & wife.

That the account filed as an exhibit with the petition is a just & correct account of the demand due the Plaintiff from the Defendant Mary E for materials furnished & work done in painting her dwelling house thereinafter described, after all just credits & setoffs have been given thereto & that the balance of $185 thereon is due & unpaid Plaintiff. That the last item charged for in said account was rendered more less than six months prior to the 3rd of April 1869 (the date of the filing of the account in the Clerk's office) viz on the 13th day of October 1868

That the work done & materials furnished were rendered by him to the Defendant Mary E

as an original contractor with her & was expended upon her dwelling house, all of which was done with the full knowledge & consent of her said husband. Then follows a description of the dwelling & land upon which it is situated.

The petition further alleges the filing of the account, properly verified, in the clerks office, setting forth the time it was done, nature & purpose of the accounts & prays for a Judgement & Execution for the said sum of $185 & that the dwelling house before described in the petition & the ground upon which it was situated to the extent of one acre might be subjected to his lien & sold to satisfy the same with costs.

The Defendant Josh. H. answered denying generally the allegations of the petition.

The Defendant Mary E demurred to the petition upon the following grounds.

Because the petition does not state facts sufficient to constitute a cause of action in this.

That it seeks to obtain a Judgement enforcing a mechanics lien against the property of the Defendant a married woman, but does not state that said property is the sole & separate property of the Defendant or that she had the power or capacity to charge the same for the payment of any of her debts.

And because the petition avers that the contract referred to was made by & with the Defendant a married woman, but does not show that the same

was made in writing or that she had any capacity or power to make a contract that would bind said property.

And Because the court had no Jurisdiction of the person of the Defendant in that this is an action at law & cannot be maintained against the Defendant she being a married woman

At the Term 1869 this Demurrer was taken up & argued & by the court sustained to which ruling of the court the Plaintiff then duly excepted. Plaintiff then took a nonsuit with leave to set the same aside & having filed the usual motion & his bill exceptions ~~took the~~ carried the cause by writ of Error to the Fifth District court, where the Judgement of the Common Pleas court was reversed & the cause remanded & the Plaintiff in Error now brings the cause here by writ of Error.

39

Wm J. Tucker Dfdt in Error

vs

Mary E. Gech Etal
Pltfs in Error

Statement of Dfdt in Error

Filed July 11/70
Burch Clerk

In The Supreme Court
Of the State of Missouri
July Term 1870.

Wm J. Tucker Defendant in Error
against.
Mary E. Gest and
Joshua H. Gest her husband Plaintiff in Error.

Points & authorities for Defendant in Error by his Counsel Jno Montgomery Jr.

1. The 21" Section of the Mechanics Lien law gives the right to enforce the lien against Married women. as well as other persons.

See also Hauptman vs Catten 20" New York 247

2nd The contract need not be in writing.

Houck on Lien Page 131.
Sec. 1. Chapter 195. Statutes 1865.
Coster & Davis vs Shorey 8" Iowa 416.

39

Wm J. Tucker Dfd Em
vs
Mary E. Gish Etal
Plfs in Error.

Authorities of Dfdh in
Error—

Filed July 11/70
Burch Clerk

In the Supreme Court of
Missouri July Term 1870

Wm J. Tucker D.E.
"
Mary E. Gest Thurston P.E.

Error to First District Court

Opinion of the Court.

The plaintiff painted & glazed a dwelling house belonging to defendant Mary E. Gest a married woman, perfected his mechanics lien upon the property & filed his petition in the Court of Common Pleas of Pettis County, to enforce the same. The petition showing all the facts was demurred to by said Mary E., because, in setting up the contract & the plaintiffs work under it, it did not show that it pertained to her sole & separate property. She claiming that she could make no contract so as to create a lien upon her property, unless held for her sole & separate use. The court gave her judgment upon the demurrer, which was reversed in the District Court.

The whole subject of mechanics liens is purely statutory & we have only to consult the statute to find the extent.

Sec 1 of the act (p 907 W.S.) provides for liens upon property for work &c "under or by virtue of any contract with the owner & proprietor thereof &c." Sec 21 defines who are owners & is as follows:

"Every person, including all cestui que trusts, for whose immediate use enjoyment or benefit any building erection or improvement shall be made, shall be included by the words "owner or proprietor" thereof under this Chapter, not excepting such as may be minors over the age of eighteen years or married women."

The language of the act quoted, seems too plain to admit of construction. It is not disputed that Mrs Gest is the owner of the building & that the work was done by

contract with her. Nor is it disputed that the improvements were made for her immediate use, enjoyment & benefit. But for fear it might be claimed that the lien cannot attach to work done under contract with persons incapable of contracting, the statute expressly provides that the words "owner" with whom contracts are made shall include minors over eighteen years & married women. This disability to contract ~~as to these~~ is pro tanto expressly removed, & while the mechanic might not be able to obtain a personal judgment against her, he shall be entitled to a lien upon the property improved by his labor, the same as though it belonged to the husband & the contract were made with him.

We are asked to say that this liability can only apply to the wife's separate estate. But the statute does not so limit it, & if there were any doubt in its construction, that doubt should be solved in favor of the lien. To hold as requested would open a very wide door for dishonesty & fraud, & enable men as well as women to improve property at the expense of others, & live in luxury upon or from the proceeds of the estate of the wife, procured valuable by the labor & property of their neighbors.

Without the provision of Sec 21 upon question, there is no doubt that a lien would lie upon the separate property of the wife, for she is able to make contracts in relation to it; & it is so held in Hamilton vs Cattin 20 N.Y. 247. This statute was doubtless necessary to enable a married woman or her agent to so far bind her ordinary estate by contract, as to subject it to a mechanic's lien.

The other judges concurring, the judgment of the District Court is affirmed & the cause remanded

P. Phillips judge

39

Wm J. Tucker S.E.

v

Mary E. Gest & others P.E.

Opinion of the Court
Bliss

Filed July 18th 1870
N C Burch
clk

Affirmed & remanded