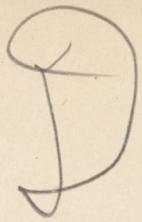

New Jersey Court of Errors and Appeals

HARRIET DAVIS (Claimant), Plaintiff-Respondent, vs. KATE A. MIAL (Owner), et als., Defendant-Appellant.	On Appeal from Hudson County Circuit Court. Judgment on Mechanic's Lien Claim.

BRIEF FOR KATE A. MIAL (OWNER), DEFENDANT-APPELLANT.

I.

Facts.

The plaintiff-respondent in the above entitled cause is Harriet Davis, a woman carrying on the business of a truckman. Her claim is for carting materials and she was employed to do said work by the contractor. Included in her bill is also a claim for eighteen loads of ashes furnished for the building at twenty-five cents per load. Her total bill is One hundred and nineteen dollars and twenty-five cents, less two dollars which the Court ordered stricken out for the carting of three iron girders not connected in any manner with the building.

This leaves a total demand of One hundred and seventeen dollars and twenty-five cents besides the costs. The same questions were raised in this case that were raised in the case of Charles S. Shultz, et al., co-partners, trading as Charles S. Shultz & Son, plaintiffs-respondents, vs. Kate A. Mial, et als., defendant-appellant, and the same objections were made to the rulings of the Trial Court and the same decision given by the Circuit Court, and appeal has been taken. The same brief that has been filed in the Shultz case presents all the arguments on those points in this case and three copies thereof have been given to the attorney for the plaintiff-respondent in this case as required by the rules of Court for the purpose of avoiding reprinting the same brief, and this Court can use the Shultz brief filed by me on behalf of Mrs. Mial in the consideration of those questions. The additional grounds of appeal in this case are found in the printed case of Shultz vs. Mial, page 49, as the fourth ground of appeal, to wit, "The plaintiff performed no labor and furnished no materials on said building which would render said building and the lands whereon the same is situate, liable to a lien."

Facts Pertinent to this Particular Cause.

At the trial of the above cause it was shown by testimony of the plaintiff that the claims were all for cartage except that the plaintiff's witness testified that she had paid twenty-five cents each for eighteen loads of ashes.

Argument.

POINT I.

The claims (except that for twenty-five cents per load for eighteen loads of ashes) should not be allowed because they are for drayage. The section of the Statute under which this claim falls is Section 1 and provides "for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the *erection* and *construction*" of a building. Omitting in argument the claim for eighteen loads of ashes at twenty-five cents per load, the entire claims are for carting exclusively. In analysing the statute, we find that the conditions under which such a claim must fall are:

1. For labor performed for the erection and construction of a building.

2. For materials furnished for the erection and construction of a building.

The plaintiff surely did not furnish any materials so (2) may be eliminated. As to labor performed it can be said in a general way that she did perform labor when she carted materials. But the Statute restricts and modifies the labor when it prescribes that the labor must be performed for the *erection* and *construction* of a building.

Did the plaintiff perform any labor in erecting the building? The definitions by Webster of the verb erect are, to raise, to found, to establish. Surely the plaintiff did not raise, establish or found any part of the building by carting materials. The definition by Webster of the verb construct are, to pile up, to form. The plaintiff did none of these.

She *drew* materials which might have never gone into the building. They might have been found useless or have been drawn wholly or partly for the benefit of someone else even under orders of the contractor. Even admitting that they all went into the building, it is not conceivable how a lien can be allowed for the carting of them *to* the building as the Statute prescribes that the labor must be performed for the construction and erection of the building. The Statute wishes to localize the effect of the labor to demand that it be used in erecting and constructing the building.

If the plaintiff had carted five times as much materials as she did, she would not have contributed one iota to the construction or erection of the building. She would only have made an immense pile of useless material. Because a contractor orders goods brought by parcel post or express or freight to be used in the construction of a building, is the Government or the Express Company or the Railroad Company entitled to a lien for labor performed in the *erection* and construction of a building? No, the Statute wishes to confine the labor to that which actually improves the realty and constructs and erects some things to that end.

The case of Evans vs. Lower, 67 N. J. Eq., 232, is the nearest approach in this State to a case in point. Here a lien was denied for tools furnished a contractor with which to work on the building and also one was denied for money lent the contractor to purchase materials to be used in the construction of the building. The materials in the plaintiff's lien claim were used in the construction of the building in question as were the above in the case cited, but neither of the claimants did any work on the materials furnished or performed any labor in the erection and construction of the building.

The other cases relied upon in this argument and of which the opinion of the several Courts were followed are:

Webster vs. Real Estate & Improvement Company, 140 Mass., 526.
Wilson vs. Whitcomb, 100 Pa. State, 547.
Wilson vs. Nugent, 125 Cal., 280, 284.

In the first of these cases, a lien was not allowed for carting sand and lumber to be used in the construction of a building and which were used to that end. In the second case cited, the Court refused to allow a lien for the carting of lumber used in the construction of a building. In the third case cited, it was held that a claim for hauling slate used in the construction of the roof of a building was not a lienable claim.

POINT II.

The judgment of the Trial Court was erroneous as it should have been in favor of the defendant. The judgment should be reversed and judgment ordered entered in favor of the defendants, unless this Court is of the opinion that judgment should have been given to the plaintiff-respondent for Four Dollars and Fifty cents for the eighteen loads of ashes at Twenty-five cents each, in which case the judgment would not carry costs and should be reversed for that reason and a judgment for the proper amount entered without costs.

Respectfully submitted,

SAMUEL A. BESSON,
Attorney for Defendant-Appellant.

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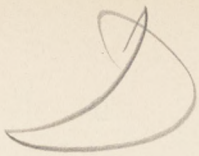

New Jersey Court of Errors and Appeals.

HARRIET DAVIS (Claimant), Plaintiff-Respondent, *v.* KATE A. MIAL (Owner), et als., Defendant-Appellant.	Action at Law. On Mechanic's Lien Claim Appeal from County Circuit Court.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT.

On application made on notice by the respondent before this Court on December third, nineteen hundred and thirteen, to dismiss the appeal, the following stipulations, embodied in an order were made, in open court and the respondent was asked to call attention to the fact in this brief.

STIPULATION I. That the appellant will not urge any ground of appeal other than her second ground, to wit, that "the contract provides that the contractor shall and will provide all the materials and perform all the work for the erection and completion of the building and in such case it is not necessary to file the specifications,

but the filing of the contract will be sufficient to protect the building and lands from liens by all persons except the contractor, notwithstanding the language of Section 2 of the mechanic's lien law."

STIPULATION II. The facts contained in the Judge's charge as printed in the state of the case are true.

STIPULATION III. If the state of the case in the judgment of the respondent fails to set forth any necessary facts or sets forth any facts improperly, the respondent has leave to supply or correct such facts in his brief.

In spite of the stipulation and order, appellant's briefs contain points on all of her four grounds of appeal.

We submit that the Court should consider the second ground of appeal only.

This is an appeal from a judgment of the Hudson County Circuit Court giving judgment in favor of the plaintiff against the defendant, Kate A. Mial, specially as owner. There are four grounds given for reversal. Case pages 48 and 49. Three of these grounds are before this court in the cases on the calendar for this term numbers 130 to 134 inclusive and referred to in the printed case. As far as these points are concerned, the above case is precisely similar to the other five cases and must stand or fall with them. The attorney for the defendant-appellant has served on the attorney for the respondent the brief which he intends to use in the case now pending in this court in the suit of Charles S. Schultz, et al., co-partners, trading as Charles S. Schultz & Son, claimants, plain-

tiffs-respondents, against the appellant, Kate A. Mial, and relies on his brief to support his contention on the first three grounds of appeal. (See appellant's brief entitled in the suit of Davis v. Mial, page 2, ll. 3 to 20.) On these three points the respondent relies on the brief filed for the respondents in the Schultz case, Mr. Dougal Herr being of counsel in that case as well as in this case. All the additional facts set forth in respondent's brief in the Schultz case exist in the Davis case and the two cases should stand or fall together on the first three points. There is also the same reason for insisting that the second ground of appeal only should be urged.

We think that the stipulation hereinabove set out eliminated the fourth point. If the court is of a different opinion, we beg to submit the following brief on that point.

This other point relied upon by the defendant-appellant is as follows: "The plaintiff performed no labor and furnished no materials on said building which would render said building and the lands whereon the same is situated liable to a lien."

ADDITIONAL FACTS.

In accordance with the stipulation entered in this cause the respondent desires to set forth the following additional facts, which do not sufficiently appear in the state of the case served in this matter. Judgment in this case was entered generally against the defendant, James A. Gordon, receiver of the Sonntag Company, builder, for $122.96 and specially to be made of the premises described in the lien claim of which the said Kate A. Mial is owner. There was the

same proof of ownership as in the Schultz case, and as is set forth in the judge's charge. The judgment was made up as follows: $5.71 interest and the balance was made up of two classes of items: One for materials sold and delivered by the claimant to the builder for use in the building, and the other for the carting of materials by the claimant and delivering them on the job for the builder for use in the building, the said carting being done by the claimant for the builder. That this is the state of facts will sufficiently appear from the questions considered by the learned trial judge on the case submitted to him as appears on the top of page 44 of the printed case.

ARGUMENT.

It is insisted that the appellant should not prevail.

The Mechanic's Lien Law of New Jersey allows a lien in favor of a claimant for transporting materials and delivering them on the job for use in the building, when the carting is done by the claimant for the builder.

The opinion of the learned Circuit Court Judge on this point will be found in the printed case on pages 43 to 47 inclusive.

In the case at bar, part of the judgment was for materials furnished by the claimant to the builder and part for the carting of materials by her and delivering them on the job for the claimant for use in the building. This squarely raises the question discussed by the Circuit Court Judge and stated above.

An examination of the statutes in New Jersey and of the authorities of other states on this question leads to the conclusion that a claim will lie for carting materials to a job, and that, therefore, the judgment should be affirmed. It is clear that there is no case in New Jersey directly decisive of this point. The case of *Bates Machine Company v. Trenton, etc., Railroad Company,* 70 *N. J. L.,* 684, is not the exact facts. Apparently the sub-contractor was to erect certain engines in defendant's power house. The court holds that the contract was an entirety, and that the expense of hauling such engines from the freight station was within the undertaking to erect the machinery in question. That seems to have been the actual point decided. This case does, however, rely on 20 *A. & E. Enc. of Law* (*second edition*), *page* 341, which shows that the overwhelming weight of authority on the question at issue is in support of plaintiff's contention. We must, therefore, look to the statutes of New Jersey, to any construction that may have been put on them by the courts, to the reasons for plaintiff's contention, and also to the decisions of other states to settle the question. Our statute (section one), provides that "every building * * * shall be liable for the payment of any debt contracted and owing to any person for labor performed and materials furnished for the erection and construction thereof," etc.

(1) *While the courts of New Jersey have not squarely decided the present controversy, they have held that the language of the statute was broad and comprehensive.*

Gardner & Meeks Co. v. N. Y. C. R. R. Co., 72 N. J. L., 257, 258;

Coddington v. Dry Dock Company, 31 N. J. L., 477, 482;
Van Pelt v. Hartough, 31 N. J. L., 331, 332;
Murphy-Hardy Lumber Company v. Nicholas, 66 N. J. L., 414, 417.

(2) *The construction contented for is a proper one.*

There is no doubt that where a person delivers material on the job that he includes in the price the cost of delivery and that the whole cost is a subject of lien. Suppose the material man agreed to furnish some article, say mantels, expensive, with costly wood and expensive mirrors, and to set these mantels up in the building. He would, where the contract is not properly filed, have a lien for the total cost which would include the sum total of all of the material and labor that had gone in the mantels from that of the owner of the land on which the timber grew and of the sand bank from which the sand for the glass was obtained, to that of the last hand that performed any work in setting up the mantels. Suppose instead the mantels should have been delivered in the form of rough lumber by the material man and put up in a cheaper form by the carpenters on the job, then the material man and all the laborers would have had their separate liens, the sum total of which would have been equal to the entire cost from the person who furnished the lumber in logs on.

Now let us take another illustration. Suppose a builder, as the Sonntag Company, wished a certain amount of iron girders, and the foundry man said, "I will deliver you this amount for

five hundred dollars; or I will sell the same at my foundry for four hundre dollars, and you deliver them," and the builder finding that he could get them delivered by a truckman for seventy-five dollars accepted the goods at the foundry. There is no doubt that the foundry man would have his lien for four hundred dollars. There is also no doubt that if he had delivered them for five hundred oollars on the acceptance of his offer to do so, he would have had a lien for the whole five hundred dollars. Now, if the truckman could not maintain his lien for his seventy-five dollars, there would be some labor that entered in the building that would not be the subject of the lien to any one. This is not the case in the illustration of the mantels set up by the material men; and is not the case where iron work was actually delivered by the foundry man. The work in one case went into the building as surely as in the other. It seems to us that if our statute is as broad as it is said to be, it must be so construed as to include the labor, when it is performed separately, just as well as when it is performed in connection with the furnishing of the materials. If this is not the case, there is some labor furnished for the building for which no one can have a lien, either directly or indirectly. The same amount of labor is performed whether the material man does the hauling or the builder does it by an independent truckman. The building would not be liable for the increased value which had been given it by the labor of the truckman, which is contrary to the spirit of our act.

Take another illustration. Suppose the Sonntag Company had made a contract to erect one building, and it never did or undertook to do

any other work of any other kind whatever. All the work performed for it, then, must have been performed for that building, all of the materials furnished for it must have been furnished for that building. Suppose he building is to cost $50,000 and $5,000 represents carting, which the company does itself through a truckman. Manifestly the labor of the truckman must have been furnished for that building. There is no lost labor, and it was not done for any other purpose, or for any other job, or for any other person than the builder of that building. It seems to us that to deny that truckman his right to lien would be not to subject he building to the lien for all the labor performed for the erection and construction thereof. It would seem to us that, contrary to the spirit of the act, the owner would be appropriating to his use without compensation the toil of that truckman. This is contrary to the spirit of our law as laid down in *Coddington v. Dry Dock Co.*, 31 *N. J. L., at p.* 482.

The views above are well supported by the courts of other states. Cyc. Vol. 27, page 44, disposes of the matter in this language:

(3) *"A lien is usually allowed for transportation of the material to be used in the construction of a building."*

The above is supported by the following cases:

McClain v. Hutton (1900), 131 Cal., 132; 61 Pac., 213, 63 Pac., 182, 622 (See 63 Pac., 182, on rehearing);

Fowler v. Pompelli (1903), 76 S. W., 173, 25 Ky. L. R., 615;

McKeen v. Haseltine, 46 Minn., 426, 49 N. W., 195, citing and following

Hill v. Newman, 38 Pa. St., 151;
Hill v. Newman (1861), 38 Pa. St., 151, 80 Am. Dec., 473;
Holeman v. Redemptorist Fathers (1887), 4 Pa. Co. Ct. R., 233;
Tizzard v. Hughes (1858), 3 Phil., 261 (Hoisting with derrick);
Keyhoe v. Hansen, 8 S. D., 198, 200, 65 N. W., 1075, 59 Am. St. Rep., 759;
Eccelson v. Hetting (1895), (Montana, 42 Pac., 105;
Hill v. Land, etc., Co., 125 Pac., 204, Idaho (Sept., 1912);
Upson v. Engineering, etc., Co., 72 Misc., 541, 130 N. Y. Supp., 726;
See also 20 A. & E. Enc. of L. (2nd ed.), p. 341.

The only discordant note comes from the case of *Webster v. Real Estate Imp. Co.*, 140 *Mass.*, 526, 6 *N. E.*, 71.

It seems to us that the reasoning of this case is not sound. An architect, who is entitled to a lien in New Jersey, does not change any material. (*Mutual Benefit, etc., Co. v. Roland,* 11 *C. E. Green,* 1189.) His services in many instances are entirely dispensed with. Small buildings, where there are no building codes, are frequently built by the owner of the land who directs his carpenters. A superintendent does not change any material, yet he is entitled to a lien (20 *A. & E. Enc. of L.* (*2nd ed.*), *p.* 342). These help in the work, however, and so does the person who delivers the material on the job. We insist that the reasoning of the Massachusetts case is not as good as that of other states that have come to an opposite conclusion; and that this case is contrary to the over-

whelming weight of authority. In order that we may not seem presumptuous in criticising the Massachusetts case, we desire to call attention to the language of the court to this case in Keyhoe v. Hansen (supra), as well as that of the learned Circuit Court Judge page 46, l. 35 of the case.

There are a few other cases that ought to be mentioned as they are sometimes quoted indirectly on the proposition at issue, but they are easily distinguishable. *Adams v. Burbank*, 103 *Cal.*, 646, 37 *Pac.*, 640 *and Wilson v. Nugent*, 125 *Cal.*, 280, 57 *Pac.*, 1008, hold that if the labor in hauling materials is for the material man, no lien can be had therefor, because the contractor owes such a laborer no liability. The cost of hauling is included in the lien of the material man provided the goods were to have been delivered by him. This distinction is clearly made in the case of *McClain v. Hutton, supra.* The cases of *McCrillis v. Wilson*, 34 *Me.* (4 *Red.*, 286), and *Coburn v. Kerswell*, 35 *Me.*, 126, are based on statutes which referred to the personal service of the claimant and are clearly distinguishable. The court in the McCrillis case said "The lien thus given is 'for the amount stipulated to be paid for his personal services and actually due'" and held that the labor of oxen was not personal services within the meaning of the act. The case of *Wilson v. Whitecombe*, 100 *Pa. St.*, 547, is on a special statute also, and does not conflict at all with the case of *Hill v. Newman*, 38 *Pa. St.*, 151, which affirms plaintiff's claim, and which is still the settled law in Pennsylvania on the issue at bar. The Wilson case though decided long after the Newman case makes no reference to it and was undoubtedly thought to involve a different principle.

This leaves for consideration the other cases cited directly in point. It seems to us that the language of the courts in some of these cases is so apt in view of the broad statute of New Jersey and the construction that has been put upon it, that there can be but one conclusion and that is, that the lien in the case at bar will lie.

It is insisted that the judgment should be affirmed.

Respectfully submitted,

RUDOLPH SCHROEDER,
Attorney for Plaintiff-Respondent.

JOHN D. PIERSON, and
DOUGAL HERR,
Of Counsel with Plaintiff-Respondent.