

Case No. 17,108.

WALLER V. DYER ET AL.

[5 Cranch, C. C. 571.]¹

Circuit Court, District of Columbia.

Nov. 26, 1839.

MECHANICS' LIENS—TIME OF PILING CLAIM.

No debt for materials furnished for building a house in Washington, Alexandria, or Georgetown, D. C. will under the act of congress of 2d March, 1833 [4 Stat. 659], remain a lien upon the house for more than two years from the commencement of the building, unless an action for the recovery of the debt be instituted, or the claim filed within three months after furnishing the materials, &c.

Bill in equity to compel the execution of a trust. The question submitted to the court, upon a case stated was, whether the complainant, who furnished materials for a dwelling house, built by Nathan Smith, who had conveyed it in trust to Dyer and Blagden, to secure certain debts of Smith, had, on the 29th of October, 1835, any lien upon the building for which the materials were furnished? The case agreed was, that Smith began to build the house before the 25th of October, 1833. That the materials were furnished by the complainant, Waller, before the 1st of August, 1834, and were used in building the house. That on that day, [Abraham B.] Waller came to a settlement of the account of materials furnished, and Smith gave his note to Waller at 90 days, for the amount, (\$651.54.) That on the 11th of November, 1834, Waller brought suit upon the note, and at March term, 1836, recovered judgment, but did not file his claim in the clerk's office, nor institute his action for the debt within three months after furnishing the materials. On the 20th of October, 1835, the creditors of Smith, excepting the complainant, and Shepherd and Mudd, who supposed they then had a lien upon the building for

the materials which they had furnished, entered into a written agreement with Smith to give him time until the 1st of November, 1837, upon his giving security by a deed of trust upon all his real estate in the city of Washington. On the 29th of October, 1835, the complainant and Shepherd and Mudd executed the following writing: "Whereas the creditors of Nathan Smith have generally united in an agreement to extend the time of their demands, upon his executing a certain deed of trust, particularly mentioned in the said agreement; and whereas we, the undersigned creditors, have liens upon part of the property of the said Nathan Smith, and are, therefore, not upon the same footing with the other creditors, but are desirous to make the same extension of credit that they have: Now we do agree to forbear any coercion of our several demands upon him for the term of two years from the first day of November next, provided that the said Nathan Smith shall and do first execute his deed of trust according to the terms of the agreement hereinbefore referred to; and provided also, that his other creditors shall agree to the like extension, so that we shall not lose any priority of lien, whether under the lien law, or otherwise, which we now may have." On the 31st of October, 1835, Smith executed the deed of trust to the defendants Dyer and Blagden, reciting the names of his creditors, and the amount due to each, and among the rest, "to Abraham B. Waller, in the sum of \$651.54. And whereas also the said Shepherd and Mudd and Abraham B. Waller have executed and delivered to the said Nathan Smith, an instrument of writing, dated on the 29th day of October, 1835, making the same extension of credit given in the first-named instrument of writing, dated on the 20th day of October, 1835, and on the same conditions, but reserving any priority of lien, whether under the act of congress aforesaid, or otherwise, which they, the said Shepherd and Mudd and Abraham B. Waller, might have on the said 29th day of October, 1835, and whereas also," &c. "Provided, however, that nothing herein contained shall be construed to impair the legal priorities of lien hereinbefore mentioned as belonging to the Patriotic Bank, and to Shepherd and Mudd, or which belongs to Abraham B. Waller."

The act of congress of the 2d of March, 1833 (4 Stat. 659), entitled "An act to secure to mechanics and others, payment for labor done, and materials furnished in the erection of buildings in the District of Columbia," after giving a lien, &c, provides: "That no such debt for work and materials, shall remain a lien on the said house or other buildings, longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted, or the claim filed, within three months after performing the work, or furnishing the materials, in the office of the clerk of the court for the county in which the building shall be situated."

It was agreed by the counsel for the parties respectively, that if the court should be of opinion that the complainant had such a lien on the 29th of October, 1835, then a decree

YesWeScan: The FEDERAL CASES

should be rendered against the trustees for the amount of the note. If otherwise, then the decree should be for an equal dividend with the other creditors.

Mr. Bradley, for plaintiff.

R. J. Brent and Mr. Hellen, for defendants.

THE COURT was of opinion that the complainant had no lien on the 29th of October, 1835, as the two years expired on the 25th.

¹ [Reported by Hon. William Cranch, Chief Judge.]