

decree dismissing the bill in the present case without reservation may be interposed, and perhaps with effect, as *res judicata* against the present complainants. To avoid this, and to save any equitable rights the complainants may actually have, a majority of this court are of opinion that the decree should be amended so as to show that the bill was dismissed without prejudice, but at complainants' cost. The decree of the circuit court appealed from is reversed, and a decree is rendered in favor of Henry Wagner and Thomas Carson, administrator with the will annexed of Maria Josefa Cavazos, deceased, dismissing the complainants' bill without prejudice, but with costs of this and the circuit court.

KEMP v. NICKERSON et al.

(Circuit Court, D. Massachusetts. March 20, 1895.)

No. 344.

LACHES—STALE CLAIM.

K., an heir at law of one N., more than 23 years after the death of N. and the probate of his will, filed a bill against N.'s executors and trustees, alleging that under the will such executors and trustees had no exclusive property in or control over certain assets of the testator, and seeking distribution thereof as intestate estate. The bill gave no reason for the delay, and charged no imposition or fraud. *Held*, on demurrer, that the suit was barred by plaintiff's laches.

This was a suit by Phoebe D. Kemp against Seth Nickerson, Jr., and others, executors of John Nickerson, deceased, to obtain distribution of a part of the estate of the decedent. Heard on demurrer to the bill.

Harvey D. Hadlock, for complainant.

Robert M. Morse, for defendants.

COLT, Circuit Judge. This case was heard on demurrer to the bill. It appears from the bill that the plaintiff is an heir at law of John Nickerson, who died in 1869, leaving an estate estimated at \$150,000; that an instrument purporting to be his last will and testament was approved and allowed by the probate court held at Barnstable in the commonwealth of Massachusetts; that the defendants were appointed executors and trustees under the will, and took upon themselves the duties thereof. The bill further alleges on information and belief that said instrument was prepared and signed when the said testator was in extremis. The bill further alleges that under the ninth clause of said instrument the defendants have no exclusive property in or control over the bank and railroad stocks coming into their hands as executors and trustees, and that the same should be distributed under the laws of Massachusetts as intestate estate. From the allegations in the bill it may be presumed that the will was probated in 1869, the year of the testator's death. This suit was not brought until 1893, or more than 23 years thereafter. There is no reason given in the bill why the plaintiff did not earlier institute suit, nor any excuse for her long delay; no impediment

on her part is alleged, or concealment in relation to the will or the probate thereof; nor is any imposition or fraud charged. One of the grounds of demurrer is the laches of the plaintiff in the prosecution of this claim. Without passing upon the other grounds of demurrer, I think this suit, under the well-settled rule governing stale claims, is barred by reason of the long unexplained delay and gross laches of the plaintiff. *Broderick's Will*, 21 Wall. 503; *Marsh v. Whitmore*, Id. 178; *Badger v. Badger*, 2 Wall. 87; *Godden v. Kimmell*, 99 U. S. 201; *Brown v. County of Buena Vista*, 95 U. S. 157; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610; *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. 437; *Pearsall v. Smith*, 149 U. S. 231, 13 Sup. Ct. 833; *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 13 Sup. Ct. 944; *Harwood v. Railroad Co.*, 17 Wall. 78; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Hume v. Beale's Executrix*, 17 Wall. 336; *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. 178; *Stearns v. Page*, 7 How. 818; *Hanner v. Moulton*, 136 U. S. 496, 11 Sup. Ct. 408; *Bowman v. Wathen*, 1 How. 189; *Boon v. Chiles*, 10 Pet. 177, 223; *Bright v. Legerton*, 29 Beav. 60; *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714. Demurrer sustained; bill to be dismissed, with costs.

PHOENIX FURNITURE CO. v. PUT-IN-BAY HOTEL CO. et al.

(Circuit Court, N. D. Ohio, W. D. February 20, 1895.)

No. 1,088.

1. MECHANICS' LIENS—LABOR OF ARCHITECT IN PREPARING PLANS AND SUPERINTENDING CONSTRUCTION.

A statute giving a lien to a person "who performs labor or furnishes machinery * * * for erecting, altering, repairing or removing of a house, * * * by virtue of a contract," etc. (*Laws Ohio 1894*, p. 135), includes not merely those performing manual or unskilled labor, but extends to the labor of an architect in preparing plans and specifications, and in superintending construction, where it appears that such plans and specifications were prepared with a view to the particular location where the building was actually erected, and in pursuance of a contract having a substantial financial basis.

2. SAME.

Quaere, whether a lien could be maintained for the plans and specifications disconnected with the labor of superintendence.

3. SAME—PLACE OF FILING LIEN.

Under such circumstances the lien claim is properly filed in the county where the building was erected and the labor of superintendence performed, although most of the labor of preparing the plans and specifications was performed in a different county.

This was a suit by Phoenix Furniture Company against the Put-in-Bay Hotel Company and others to enforce a mechanic's lien.

George H. Beckwith and A. L. Smith, for complainant.

M. G. Bloch and J. K. Hamilton, for E. O. Fallis & Co.

A. P. Crane and W. H. A. Read, for John M. Crocker.

RICKS, District Judge. The journal entry referring this case to a special master is not before me, neither are its terms referred to in the master's report; so I am not sure as to the exact nature of