

Case No. 4,148. DUNHAM v. CINCINNATI, P. & C. R. CO.
[9 Pittsb. Leg. J. 90.]

Circuit Court, D. Indiana.

1861.

RAILROAD MORTGAGES—CONSTRUCTION CONTRACT—PRIORITY OF LIENS.

- [1. A mortgage executed upon a railroad right of way before the building of the road does not, in law, include the road when completed. But equity will hold that the road is included, when, from, the terms of the mortgage, such appears to be the intention of the parties.]
- [2. But where, after execution of the mortgage, the company is unable to build the road, and thereupon makes a contract with a third person for the construction thereof, with a stipulation that he may retain possession of the road and its earnings until receipt of payment, this gives him an equity, superior to that of the mortgage bonds, to receive payment from the proceeds of the road on foreclosure sale.]
- [3. To uphold this equity the court will presume that the trustees and bondholders assented to the contract under which the road was built.]

Dunham as mortgagee filed his bill against the railroad company, Walker et al., to foreclose a mortgage upon the right-of-way, road, &c, of the company, to satisfy the interest due and unpaid on the first mortgage bond. Walker, in his answer, alleges, that, after the mortgage was made, and 300 bonds had been issued, and while the road was but partially graded, say one-fourth of the cost of construction had been expended, the company, being otherwise unable to construct the road, agreed with him to construct it. That the company agreed to pay him therefor a certain amount of its bonds, and also agreed that Walker should retain possession of the road and its earnings until the company paid him what it might be owing him therefor. That he completed the road in July, 1856, and has ever since retained possession of it. That the company was then owing him, principal and interest over and above the bonds he had received from the company, \$154,800, for which amount he claimed priority of payment in the distribution of the proceeds of the sale of the road.

THE COURT decided such priority in his favor.

THE COURT held:

1. That the road not being in existence when the mortgage was made, the mortgage at law did not cover it. That by the terms of the mortgage it appears to have been the intention of the parties that the road when built should be covered by the mortgage, and was consequently enforceable in equity and only there, and that, therefore, the doctrine of industrial annexations to the soil did not cause the superstructure made by Walker to pass under the mortgage, to the exclusion of Walker's rights under the agreement.

2. That the large expenditure of Walker in completing the road, and the company's inability to otherwise do so, than by agreeing to leave Walker in possession until the company paid him what it might owe him therefor, presented so manifest and superior an

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equity to priority of payment from the proceeds of the sale of the road, that no court of equity would deprive Walker of the road and its earnings without awarding and enforcing that priority; and to uphold that priority, the court would presume that the trustee and bond-holders assented to the agreement between Walker and the company giving that priority, if such presumption were necessary, to overcome any technicality of the law militating against such a manifest equity.