

UNITED STATES EXP. CO. v. POE, Auditor of State of Ohio, et al.

AMERICAN EXP. CO. v. SAME.

(Circuit Court, S. D. Ohio, E. D. April 23, 1894.)

Nos. 675 and 674.

FEDERAL COURTS—JURISDICTIONAL AMOUNT—TAXATION.

In a suit in the federal court to enjoin an assessment under a state law alleged to be unconstitutional, a preliminary injunction will be denied where it appears, by uncontradicted affidavits, that the increased tax imposed by reason of such illegal assessment is less than \$2,000, though the averments of the bill are sufficient to give the court jurisdiction.

In Equity. On demurrer. Bills by the United States Express Company against Ebenezer W. Poe, auditor, John K. Richards, attorney general, and William T. Cope, treasurer, of the state of Ohio, and by the American Express Company against the same defendants. Bills dismissed.

Ramsey, Maxwell & Ramsey, for complainants.

J. K. Richards, Atty. Gen., and Thos. McDougall, for respondents.

TAFT, Circuit Judge. These are suits in equity brought to enjoin the collection of taxes under the so-called "Nichols Law" of Ohio, and on the merits present much the same questions which have already been decided in the cases of the Western Union Telegraph Company and the Adams Express Company against the same defendants. 61 Fed. 449, 470. In these cases, however, it clearly appears by affidavit that the difference between the amounts upon which the complainants must pay taxes under the laws in force, if the Nichols law is invalid, and the amounts upon which they are required to pay by the assessments of the defendants as a board of appraisers under the Nichols law, is in the case of the American Express Company but \$23,000, and in the case of the United States Express Company but \$18,082. The average rate of taxation in Ohio, as shown by the affidavits, is from 2½ to 3 per cent. Such a percentage of this difference would make the whole amount in controversy in each case less than \$2,000. It is true that the averments of the bill are sufficient to give the court jurisdiction, but the affidavits show (and there are no counter affidavits) the facts to be as above stated. While, therefore, I cannot sustain the demurrers to the bills, on the ground that, on their faces, they show a lack of the jurisdictional amount in controversy, I can refuse the preliminary injunction on that ground. I can dismiss the bills on the ground that they do not show a payment of the taxes due under old section 2778, Rev. St. Ohio, which would be in force if the Nichols law is unconstitutional, and can refuse to permit an amendment such as I have permitted in the Western Union Telegraph Company and Adams Express Company cases. The demurrers in this case to the bills will, therefore, be sustained, and the bills dismissed.

PACIFIC ROLLING-MILL CO. v. HAMILTON et al.

(Circuit Court, D. Washington, N. D. March 31, 1894.)

MECHANICS' LIENS—WHO ENTITLED TO—CONSTRUCTION OF STATUTE.

A statute gave a lien to any person furnishing materials, etc., to the owner of any building or other improvement, "or his agent," and further declared that "every contractor, subcontractor, architect, builder or person having charge * * * either in whole or in part, of any building or improvement shall be held to be the agent of the owner for the purposes of this chapter." 1 Hill's Code Wash. § 1663. *Held*, that the enumerating words were all qualified by the words "person having charge," etc., and that one who merely contracted with the manager of a construction company, in his individual capacity, to furnish materials for use by the company, and afterwards purchased the materials from plaintiff, was not the agent of the company, so as to entitle plaintiff to a lien.

Bill by the Pacific Rolling-Mill Company against C. L. Hamilton and James Street Construction Company, a corporation, to recover the balance of purchase price of materials used in the construction of the James Street Cable Railway in Seattle, and to establish and foreclose a lien for said balance. On final hearing.

Mitchell Gilliam, for complainant.

Eben Smith, for defendants.

HANFORD, District Judge. This is a suit in equity to recover from C. L. Hamilton \$6,731.22, being the balance of the purchase price of materials sold and delivered by the complainant to said Hamilton, to be used in the construction of the James Street Cable Railway in Seattle, and to establish and foreclose a statutory lien upon said railway and the power house and real estate connected therewith and appurtenant thereto. Hamilton has not been served with process, nor appeared to defend. The James Street Construction Company, owner of the property upon which a lien is claimed, has, after demurring to the bill, answered, contesting the claim to a lien. Evidence and arguments have been submitted in behalf of the complainant and said defendant. As to many of the questions argued by counsel I have not formed a definite conclusion. Having found one fatal objection to the lien, it is not expedient for me to pass upon or discuss the other points. The statute of this state under which the lien is claimed provides as follows:

"Every person performing labor upon or furnishing materials to be used in the construction, alteration or repair, of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, sub-contractor, architect, builder or person having charge of any mining or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter." 1 Hill's Code Wash. § 1663.

The vital defect which I find in the complainant's case is in the failure to show that the materials were furnished by it at the in-