

CENTRAL TRUST CO. v. CONDON et al.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1895.)

No. 207.

1. CONTRACTS—INTERPRETATION.

One E., in April, 1890, made a contract with the K. Ry. Co. for the construction of its road. The contract was dated back to August, 1887, to cover the time during which a construction company had been engaged in building a part of the road, under a contract which had been assigned to E. The first clause provided that E. agreed to build and complete the road on the designated route, according to specifications. By the second clause E. agreed to furnish the money to pay for right of way and depot grounds, and for legal proceedings necessary to acquire the same, and it was mutually agreed that all works, materials, and plant theretofore constructed, equipped, and provided by either party, then in use about the construction or operation of the road, should be deemed works, materials, and plant provided under the agreement by E., and should be his property. By the third clause the K. Ry. Co. agreed, whenever required by E., to survey and lay out its road, and acquire by purchase or condemnation such rights of way, etc., as were necessary. The fourth and fifth clauses provided that the railway company should execute a mortgage to secure its bonds, or the bonds of any other company taken or used by E. in payment, to the amount of \$20,000 per mile, and to pay E. for the railroad construction \$20,000 per mile in first mortgage bonds and \$20,000 per mile in stock. The last clause provided that the road should be fully constructed, and furnished with all the appurtenances contracted for, before August 13, 1890, but that E. might sooner deliver to the railway company any completed portion of the road, and the same should then be operated by the railway company, E. paying all expenses and receiving all the earnings. *Held*, that this contract did not impose upon E. an obligation to furnish the road with an equipment of rolling stock.

2. SAME—DAMAGES—FAILURE TO DELIVER WORTHLESS STOCK.

E. received a large amount of the stock of the railway company, but less than he was entitled to receive. At the time when he first made a demand for the stock, however, it was worthless. *Held*, that E. was not entitled to any damages for the failure to deliver such stock.

3. SAME—CONSTRUCTION OF RAILROAD.

In order to complete the road within the time limited, and to secure certain stock subscriptions, made conditional upon such completion, E., with the assent of the railway company, constructed a temporary line around a difficult part of the road, and afterwards constructed a part of the permanent line by a more direct route, which required more difficult and slower work. E. received the stipulated rate per mile for the temporary line. *Held*, that E. was entitled to payment and a lien for so much of the permanent line as he completed as it was reasonably worth.

4. SAME.

Held, further, that E. was not entitled to extra pay for building cattle guards, water tanks, stop gaps, slides, sidings, or Y's, the same being all parts of the complete construction of the road; nor was he entitled to a lien, under the Tennessee statute (Mill. & V. Code, § 1774), for a steam shovel, purchased by E., and which passed into the possession of the railway company.

5. SAME.

Held, further, that E. was entitled to be repaid for expenditures for engineering of the road.

6. SAME—PAYMENT OF INTEREST ON BONDS.

Pursuant to an arrangement between the K. Ry. Co. and the M. Ry. Co., a line owned by the same persons who had projected the K. Ry. Co. as an extension of the M. Ry., bonds of said M. Ry. Co. were issued to E. in part payment of the amounts due under his contract. Before the contract was completed, certain interest on these bonds fell due,

and E., by arrangement with the M. Ry. Co., took up and paid part of the coupons on such bonds out of the proceeds of bonds delivered to him under his contract. *Held*, that E. was entitled to be reimbursed by the K. Ry. Co. for such payments, and the amount received by him under the contract was to be considered reduced *pro tanto*.

7. SAME—ENGINEERING—LIEN.

Held, further, that assistant engineers, engaged upon work which, under the contract between the railway company and E., the company was bound to pay for, were entitled to recover the amounts due them directly from the railway company, and to have liens therefor against its property, upon complying with the requirements of the statute as to the steps necessary to secure such liens.

8. CORPORATIONS—AUTHORITY OF PRESIDENT.

Held, further, that while the contract with E. was in existence, the president of the K. Ry. Co. had no authority, as such, to make a contract which would bind the company, with another person or firm, to do part of the work which E. was bound to do, especially when such other person or firm knew of E.'s contract.

9. LIENS—PRIORITIES—ALLOWANCE OF INTEREST.

In the distribution of the proceeds of a common security between liens of different priorities, interest should be allowed upon the superior lien up to the time of satisfaction.

10. RAILROADS—AUTHORITY TO MORTGAGE—TENNESSEE STATUTE.

The provisions of the Tennessee statute (Mill. & V. Code, § 1277) requiring notice to be given, by advertisement in certain newspapers, of a meeting of the stockholders of a railroad company at which a mortgage is authorized, is for the protection of stockholders, and, until some stockholder objects to the validity of a mortgage authorized at a meeting which was not so advertised, no other person can object on that ground.

11. JUDGMENTS—EVIDENCE.

A judgment against a railroad company for material claimed to be furnished in its construction directly to the company is not evidence that such material was furnished directly to the company, and not to a contractor building its road, as against holders of the bonds of the company, in a cause where the controversy is as to the priority of the lien of the mortgage securing the bonds and a lien claimed by the person furnishing the material.

12. MECHANICS' LIENS—TENNESSEE STATUTES—SUIT TO ENFORCE.

Under the statute of Tennessee relative to liens of mechanics and others against railroads (Act 1883, c. 220), an intervening petition, filed by the claimant, in a cause to which the railroad company is a party, claiming a lien, in the alternative, either against the railroad company direct, or through another party to the suit as principal contractor, as the facts might appear, is a sufficient compliance with the requirement of a suit to enforce the lien of a principal contractor.

13. SAME—ATTACHMENT.

Under such statute it is not necessary for a claimant to issue an attachment against the property of the railroad company.

14. SAME—WHAT CONSTITUTES NOTICE.

Under such statute, a declaration, in a suit by the claimant against the railroad company, served upon such company, and containing a count based upon a subcontractor's lien arising out of a contract with the principal contractor for the construction of the road, is a sufficient notice to the railroad company of the plaintiff's claim of a subcontractor's lien, though the suit is afterwards dismissed by the plaintiff.

15. SAME—SUIT TO ENFORCE.

Within the time limited by said statute after serving notice of lien on the railroad company, a subcontractor filed a bill against the railroad company, to which the principal contractor, and all other parties holding liens or mortgages on the road, were made parties, in which he claimed a principal contractor's lien, but averred that, owing to the dealings

between the principal contractor and the railroad company, it was doubtful whether complainant and others engaged in the construction of the road were principal or subordinate contractors, and asked that their liens be declared first liens, or for such other or different relief as might seem meet. *Held*, that the bill might be treated as one to enforce a subcontractor's lien, and hence as a compliance with the statute.

16. COLLECTION OF TAXES—TENNESSEE STATUTE.

The statute of Tennessee relative to taxation of railroads (Acts 1875, c. 78, Mill. & V. Code, §§ 669-708) provides that state taxes may be collected by the comptroller by distress and sale, and, on failure to obtain satisfaction out of the personal property, by sale of the real property and franchises; and also that the collector of taxes of any county shall collect the amount due to the county as now provided by law, in case of delinquents. *Held*, that these provisions constitute an exclusive mode of collection of railroad taxes, and that as, at the time of the passage of the act, the general tax laws provided no penalty for delinquents, no such penalty could be imposed on a railroad delinquent in payment of taxes, notwithstanding a penalty had been imposed by subsequent legislation for delinquents under the general laws.

17. PRACTICE—ALLOWANCE TO COUNSEL.

Where a bill has been filed to foreclose a mortgage on a railroad, and persons holding liens on the road afterwards file a general creditors' bill to ascertain and clear all liens on the road prior to the mortgage, making the mortgagees and all other lien holders parties, it being necessary to a successful sale of the property that the various liens should be ascertained and cleared off, and such creditors' bill being consolidated with the foreclosure suit, the plaintiffs in such creditors' bill are entitled to an allowance for counsel fees out of the fund derived from the sale of the road for their services in filing the bill and bringing in all lien claimants.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

This was a suit by the Central Trust Company of New York to foreclose a mortgage given by the Marietta & North Georgia Railway Company, with which was consolidated a suit by V. E. McBee and others against the Central Trust Company and others to restrain the prosecution of the foreclosure suit and of other claims against the property on which they claimed liens, and praying for a sale and payment of their claims from the proceeds. All creditors were directed to file their claims in the consolidated cause, and numerous lien claimants accordingly filed intervening petitions. A motion to dismiss the bill of McBee et al. for want of jurisdiction was denied. 48 Fed. 243. A decree for sale and distribution was made, from which cross appeals were taken by the Central Trust Company and the lien claimants, and which was reversed on the Central Trust Company's appeal. 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. 753. After further hearing in the circuit court a new decree was entered, from which both the Central Trust Company and some of the lien holders again appeal.

This is a second appeal in this case. The opinion of the court on the former appeal is reported under the name of Central Trust Co. v. Bridges, 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. 753. The controversy relates to the priority of liens on a railroad running from Knoxville south towards Marietta, in Georgia, 118 miles, and known at the time of its construction as the Knoxville Southern Railroad. The Marietta & North Georgia Railway Company of Georgia owned a narrow-gauge railroad running north from Marietta towards the North Carolina and Tennessee lines. Persons interested in its stock, especially R. M. Pulsifer and George R. Rager, conceived the plan of making