

cludes street railways, would apply with equal force to section 7 of the act of 1862, or its substitute, to wit, section 2002 of McClain's Code, which declares the liability of every corporation operating a railway for all damages sustained by any person, including employes, in consequence of the negligence of the agents or servants of the company in the operation of the road; and yet it is clear that the legislature of the state did not so regard it, for the eighteenth general assembly, in the second section of chapter 32 of the act passed by it, expressly enacts that street-railway companies "shall also be liable for all damages sustained by any one, resulting from the carelessness of its officers, agents or servants, in the construction or operation of its railway," which enactment would not have been necessary if street railways were included in the previous legislation now codified as section 2002 of McClain's Code.

The conclusions reached are that, as there is in fact a marked distinction between railroads used in the furtherance of the general passenger and freight traffic of the state and those used for street purposes only, we should naturally expect to find in the legislation of the state provisions applicable to the one class which are not applicable to the other; that an examination of the statutes of the state shows that such difference is recognized therein; that chapter 5, tit. 10, McClain's Code, is intended to embrace the provisions applicable to companies engaged in the general passenger and freight traffic; that, as that is the general purpose of the chapter, the court is not justified in excepting out of it one or two sections, and holding that they include also street railways, when the latter are not specifically named therein, and there is nothing in the context of the chapter or in the text of the original act of 1862 which shows the legislative intent to include street railways therein; that the adoption of other sections of the statute, not included in said chapter 5, which authorize the construction and operation of street railways under the control of the city or town, with special provisions in regard to right of way, and liability for injuries caused to others, shows clearly that the legislature did not intend to include street railways within the provisions of chapter 5, tit. 10, and that the court cannot so include them, upon the argument that the proper protection of the people requires the application of the same rule to both classes of corporations, it being for the legislature to give force to this argument, if it deems it advisable so to do. I therefore hold that the claim of the intervener, while valid against the defendant company, is not superior or paramount to the mortgage lien held by the complainant in trust for the bondholders.

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OOLAGAH COAL CO. v. McCALEB et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 551.

1. EQUITY—JURISDICTION—TRESPASS.

Complainant's bill alleged that it held several licenses from the Cherokee Nation to mine and sell coal on certain lands described, and for more

than a year had been mining and selling coal thereunder; that the defendants, under a license issued after complainant's, and, either under a mistake of fact or through fraud on defendants' part, had entered upon the lands, and were mining and shipping coal, and preventing complainant from so doing; that such acts tended to destroy the estate created by the licenses, and were inflicting irreparable injury upon complainant; and that some, if not all, of the defendants were insolvent. *Held*, that equity had jurisdiction to enjoin the defendants from mining coal on the lands, and from preventing the complainant from so doing.

**2. SAME—MINING RIGHT—LICENSE.**

*Held*, further, that equity had jurisdiction to determine the validity of defendants' claim of title, whether the same was founded in mistake or fraud.

Appeal from the United States Court in the Indian Territory.

This was a suit by the Oolagah Coal Company against A. F. McCaleb, Grant Roberts, C. A. Schmoy, and C. D. Evans to restrain the defendants from mining coal on certain lands. The circuit court sustained a demurrer to the bill. Complainant appeals. Reversed.

Thomas A. Sanson, Jr., and S. M. Porter (Oliver P. Ergenbright and Z. T. Walrond, on the brief), for appellant.

H. C. Dooley (J. H. Keith, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The appellant, the Oolagah Coal Company (hereafter termed the "Coal Company"), filed a bill against the appellees, A. F. McCaleb, Grant Roberts, C. A. Schmoy, and C. D. Evans, in the United States court in the Indian Territory for the First judicial division and after due service of process the defendants appeared, and filed a general demurrer to the bill on the ground that "the said complaint does not state facts sufficient for a complaint." The demurrer was sustained, and a final decree was thereupon entered, dismissing the bill, whereupon the plaintiff prayed for an appeal, and the same was allowed. The only question, therefore, that arises upon the appeal, is whether the bill of complaint stated a case entitling the plaintiff to equitable relief. The bill averred, in substance and in legal effect, the following facts: That the coal company was a corporation duly created under the laws of the state of Kansas, and that the defendants were residents within the First judicial division of the Indian Territory; that the Cherokee Nation had theretofore lawfully issued five mineral licenses, pursuant to the laws of the Nation, to certain licensees therein named, which licenses conferred on said licensees the exclusive right to mine and sell coal on the various tracts of land described in said licenses; that the several licensees had duly assigned the licenses, in writing, and that by virtue of the several assignments, which were particularly described in the bill of complaint, the coal company had succeeded to all of the rights, privileges, and franchises of said licensees, including the exclusive right to mine and sell coal on the lands described in said licenses, and that for more than a year prior to the filing of the bill the plaintiff company had been actually en-

gaged in so mining and selling coal; that all of the licenses aforesaid were assigned by, and that the assignments thereof were obtained from, the licensees, by the plaintiff company, in accordance with the laws of the Nation. Copies of said laws, as well as copies of the several licenses and the assignments thereof, were made exhibits to the bill. The bill next averred that the defendants, well knowing the aforesaid facts, had unlawfully, by force and arms, entered upon a portion of the lands described in the aforesaid licenses, and were then unlawfully engaged in mining coal thereon and in shipping the same, and were preventing the plaintiff company from so doing, to its great and irreparable injury. The bill also averred that the acts aforesaid tended to destroy the estate created by the licenses in the coal lands in question; that the damage done by such wrongful acts could not be accurately ascertained, and was not susceptible of estimation in money; that some, if not all, of the defendants were insolvent; that at least \$5,000 worth of coal had already been wrongfully mined and sold by the defendants; and that for the wrong and injury done and threatened the plaintiff company was without any adequate remedy at law. The bill further stated that a mineral license had been issued by the Cherokee Nation to A. F. McCaleb, one of the defendants, on September 13, 1892, which covered the lands in controversy between the parties, but that such license was issued subsequent to the licenses under which the plaintiff company claimed, and that it was either issued under a mistake of fact, or was obtained by said A. F. McCaleb through fraud, and was therefore illegal and void. In view of the premises the bill prayed for an injunction restraining the defendants from further mining coal on the lands in controversy, and from further obstructing the plaintiff company in so doing, and for general relief.

The chief ground on which the defendants below, who are the appellees here, seek to sustain the action of the trial court in sustaining the demurrer and in dismissing the bill, is that the plaintiff company had a plain, adequate, and complete remedy at law. This view, however, overlooks the important fact disclosed by the record that the injury complained of by the plaintiff company was not an ordinary trespass upon lands, of temporary duration, but was a continuous trespass, which threatened to destroy the character of the property as a mine, and to render the plaintiff's interest therein utterly valueless. It also overlooks the fact that the bill charged, in substance, that whatever colorable right the defendants had to mine coal on the lands in controversy was derived under a license that had either been issued by mistake, or had been obtained by one of the defendants through fraud. It is now well settled by many adjudications, beginning with the case of *Mitchell v. Dors*, 6 Ves. 147, that an injunction may be granted to restrain a trespasser from entering into a mine and removing the minerals therefrom. Trespasses of that kind, as well as those which consist in cutting down and removing timber, or in removing buildings or other improvements of a permanent character, standing upon lands, are readily enjoined, because, as has sometimes been said, such acts alter the character of the property, and also tend to destroy

it, and to occasion irreparable loss and damage. *Courthope v. Mapplesden*, 10 Ves. 290; *Scully v. Rose*, 61 Md. 408; *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565; *Jerome v. Ross*, 7 Johns. Ch. 315; *Hammond v. Winchester*, 82 Ala. 470, 2 South. 892; *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367; *Iron Co. v. Reymert*, 45 N. Y. 703; *Beach, Inj.* § 1155; *High, Inj.* (1st Ed.) § 469. It is also held that, even when the title to the property on which the trespass is committed is in dispute, a court of equity will at least award a temporary injunction against the commission of such acts as tend to permanently alter its character or destroy its value, until the title thereto is determined in an appropriate proceeding inaugurated for that purpose. *Clayton v. Shoemaker*, 67 Md. 216, 9 Atl. 635; *Smith v. Jameson*, 91 Mo. 13, 3 S. W. 212; *Beach, Inj.* § 1140, and cases there cited. We fail to see, therefore, that the plaintiff company was without right to equitable relief, even if it be true, as the defendants contend, that the bill discloses a controversy between the parties as to who has the superior right to mine coal on the lands in question, which can only be appropriately determined by a court of law. If such was the fact, it would nevertheless be competent for a court of equity to restrain the commission of such trespasses as are charged in the bill, which tend to render the property valueless for mining purposes, until the controversy existing between the parties is settled by the proper tribunal. We think, however, that in so far as the bill shows that the right to mine coal is in dispute, and that the defendants are acting under a claim or color of title, it also shows that that controversy is one which is within the jurisdiction of a court of equity. The allegation is that the license from the Cherokee Nation under which the defendants are acting was issued after the issuance of the licenses to the plaintiff's assignors, and that it was either issued under a mistake of fact, or was obtained through fraud. A court of equity is certainly competent to inquire and to decide whether the license in question is void on either of these grounds. From any point of view, we think that the bill stated a case entitling the plaintiff to some measure of equitable relief. It showed that the mines underneath the land were being rapidly exhausted by the alleged trespassers; that some, if not all, of the trespassers were insolvent; that the trespass was not temporary, but continuous; that the plaintiff company had an exclusive right to mine coal on the lands in question; and that, in so far as there was a dispute as to who had the better license, the question at issue was one of equitable cognizance. The trial court therefore erred in sustaining the demurrer and in dismissing the bill. Its decree is accordingly reversed, and the cause is remanded, with directions to overrule the demurrer to the bill of complaint, and to proceed with the trial and determination of the case in a manner not inconsistent with this opinion.

## CENTRAL TRUST CO. v. RICHMOND, N., I. &amp; B. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

No. 240.

## 1. MECHANIC'S LIEN—WAIVER—INCONSISTENT SECURITY.

It seems that, while the right to a mechanic's lien may be waived by the acceptance of a contract to pay for the work in securities whose existence is inconsistent with the existence of a lien, such waiver is only conditional upon the actual performance of the contract, and if it is not performed the right to the lien continues.

## 2. SAME—KENTUCKY STATUTE—WHEN LIEN ARISES.

The Kentucky statute relative to mechanics' liens upon railroads (Barb. & C. Ky. St. 1894, §§ 2492-2495) provides (section 2492) that "all persons who perform labor or who furnish labor, materials or teams \* \* \* by contract \* \* \* with the owner \* \* \* or by subcontract thereunder, shall have a lien \* \* \* which \* \* \* shall be prior and superior to all other liens theretofore or thereafter created." Section 2493: "The liens \* \* \* shall in no case be for a greater amount in the aggregate than the contract price of the original contractor and, should the aggregate \* \* \* exceed the price agreed upon, \* \* \* there shall be a pro rata distribution. \* \* \*" Section 2494: "No lien shall attach unless the person who performs the labor or furnishes the labor, material or teams shall, within 60 days after the last day of the last month in which any labor was performed or material furnished, file \* \* \* a statement \* \* \* setting forth the amount due," etc. *Held* that, under this statute, the lien originates with the beginning of the work or delivery of materials, and continues, as an incipient or inchoate lien, until perfected by filing the required notice, etc., or lost by failure to do so within the prescribed time.

## 3. SAME—NATURE OF SUBCONTRACTOR'S LIEN.

*Held*, further, that a subcontractor in the first degree is given by said statute a direct lien, independent of the lien of the principal contractor, or of a waiver or loss thereof.

## 4. SAME—TIME FOR FILING NOTICE.

*Held*, further, that the statute requires each particular contractor or subcontractor to file notice of his lien within 60 days from the end of the month in which he completes his own work, and not from the end of that in which the work of the last contractor or subcontractor engaged upon the undertaking is completed.

## 5. SAME—PAYMENT TO PRINCIPAL CONTRACTOR.

The R. Ry. Co. made a contract with the O. Contract Co. to build its road; payment to be made in stock and bonds deliverable from time to time, as the work progressed, upon monthly certificates of the engineer of the railway company, in proportion to the amount of work completed; the monthly estimates being subject to revision on the final settlement, at the completion of the work. This contract contained no provision for securing the railway company against liens of subcontractors, or permitting it to pay them directly. The contract company made subcontracts with various persons to do parts of the work, to be paid for in money. *Held*, that neither the contract with the principal contractor, nor payment to it in accordance with such contract, could affect the rights of the subcontractors to liens upon the property of the railway company.

## 6. SAME—APPLICATION OF PAYMENTS TO SUBCONTRACTOR.

The amount of the subcontracts made by the contract company exceeded the amount coming to it by the contract with the railway company. Payments were made from time to time by the contract company to the subcontractors, some receiving a larger proportion than others, and the payments in certain months being nearly equal to the amount due to the subcontractors, according to the engineer's estimates for such months. *Held*, that such payments were primarily applicable to that part of the subcontractors' claims which could not be secured by liens against the