

## 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

owner's property, without regard to the proportion of lienable claims in the estimates for the particular months when the payments were made, and that the subcontractors were entitled to the full benefit of their liens until paid the whole amount due them, respectively.

7. SAME—ASCERTAINMENT OF PRO RATA SHARES.

*Held*, further, that, in ascertaining the amount of the pro rata shares of the contract price to which the several sub-contractors were entitled, such contract price should be apportioned according to the whole amount of their respective lienable claims, whether or not partly paid by the principal contractor, and whether or not actually perfected as liens.

8. SAME—VALUE OF PRICE PAID IN SECURITIES.

The bonds and stock called for by the contract with the O. Contract Co. were delivered to it, in accordance with such contract, and were sold by it, from time to time, some nearly at par value, others at very much less. *Held* that, for the purpose of determining the money value of the contract price to be paid to the O. Co., by which the liens of the subcontractors were limited, the market value of the stock and bonds at the times when they were actually delivered to the contract company should be ascertained.

9. SAME.

The contract company was able, by assigning to another railway company the stock, paid to it by the R. Ry. Co., to procure the indorsement of such other railway company on some of the bonds paid to it by the R. Ry. Co., thereby enhancing their value. The stock had no value, except in the voting power attached to it as an inducement to such an arrangement. *Held*, that the enhanced value of the bonds, thus secured, might properly be included as part of the money value of the price paid the contract company, though the R. Ry. Co. had nothing to do with the arrangement for the indorsement of its bonds.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This was a suit by the Central Trust Company against the Richmond, Nicholasville, Irvine & Beattyville Railroad Company and others for the foreclosure of a mortgage. Numerous parties intervened, claiming mechanics' liens on the road. Demurrers to some of such petitions were passed upon by the circuit court in a decision reported in 54 Fed. 723. The circuit court entered a final decree settling the priorities among the various claimants. The complainant appeals.

The questions for determination arise between creditors of the defendant railroad company, claiming mechanics' liens for the construction of its road, and the holders of its first mortgage bonds, issued shortly after construction was begun. The Richmond, Nicholasville, Irvine & Beattyville Railroad Company, hereafter designated and described as the "Railroad Company," was chartered by special act of the Kentucky legislature, and authorized to construct and operate a railroad from Versailles, in Woodford county, to Beattyville, in Lea county, Ky. The charter provided that the company might pay for the construction of its railroad with its own capital stock and bonds. On the 1st day of July, 1889, the railroad company executed its first mortgage to the Central Trust Company of New York, as trustee, which mortgage recited that it had executed, and made ready for delivery, 2,375 bonds, of the denomination of \$1,000 each, bearing interest at the rate of 6 per cent. per annum, payable semiannually, evidenced by coupons attached, the principal being payable 30 years after date. It was also provided that upon default in the payment of interest for more than six months the principal sum mentioned in each of the said bonds should, at the option of the holders of a majority of the bonds, become due and payable. There was a default in the payment of interest for more than six months, whereupon, at the request of a majority of the holders of the bonds, the trust company declared the maturity of the prin-