

CENTRAL TRUST CO. v. VALLEY RY. CO. et al.

(Circuit Court, N. D. Ohio, E. D. January 2, 1897.)

RAILROAD COMPANIES—EMINENT DOMAIN—JUDGMENT FOR LAND APPROPRIATED
—LIEN.

A judgment under Rev. St. Ohio, § 6448, for the value of land appropriated by a railroad company, in favor of a landowner who has failed to take proceedings to prevent the construction of the road over his land, or to obtain compensation, is not a lien on the land.

Doyle & Bryan, for Apolonia Orth.

Kline, Carr, Tolles & Goff, for defendants.

SEVERENS, District Judge. In this matter the petitioner prays that she may be declared entitled to a lien upon the property of the said Valley Railway Company for the amount of the judgment recovered by her against the above-named defendant, the Valley Railway Company, on the 12th day of April, 1890, in the probate court of Summit county. It appears that this judgment was recovered for certain real property appropriated by the said railway company, belonging to the petitioner, which had been appropriated and used for some time by the railway company, prior to the date of the recovery of the above-mentioned judgment. The proceedings for the condemnation of property for railway purposes, where such condemnation takes place before the appropriation of the property, and also where the property has been appropriated before condemnation, are regulated by the statutes of Ohio relating to that subject. The effect of the statute has been construed by the supreme court of the state, and such construction is binding upon, and must be followed by, this court. By the decisions of the said supreme court in the cases of *Goodin v. Canal Co.*, 18 Ohio St. 169, and *Railroad Co. v. Robbins*, 35 Ohio St. 531, it would seem that the petitioner, by failing to take proceedings for the purpose of obtaining compensation or preventing the construction of the railroad over her land, is estopped from asserting any other remedy than that provided by the twenty-first section of the act of 1872 (69 Ohio Laws, 95; Rev. St. § 6448), whereby she might have the value of her land ascertained by a jury, and obtain a judgment for the value thereof, to be collected by execution. By this proceeding the judgment is not made a lien or a charge upon the land, and there remains to the owner only the right of compensation. It is only necessary here to decide that under the twenty-first section of the act, upon which judgment was recovered, she still retains her title, and it would be incongruous that one should have a lien upon his own land. Doubtless the title remains in her, but she may be precluded from asserting that title upon the grounds stated in the first of the above-mentioned cases. I think, therefore, that this petition must fail, and that judgment must be entered disallowing the same.

THIRD STREET & SUBURBAN RY. CO. v. LEWIS.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

MORTGAGES—PURCHASE OF MORTGAGED PREMISES BY RAILROAD COMPANY—RECEIVER'S CERTIFICATES—PRIORITIES—FORECLOSURE.

In 1884 the W. Co. mortgaged to L. certain city lots. In 1891 it sold them, subject to the mortgage, to a railway company, which proceeded to erect a power house upon them, and put them to railroad uses. Subsequently, in a suit brought against the railway company, a receiver was appointed, who operated the railroad under the orders of the court, and, to pay operating expenses, issued receiver's certificates, also under an order of the court, which made such certificates a first lien on the company's property. Upon the request of the certificate holders, the railway company's property, including the lots, was sold, and the proceeds applied to the payment of the certificates. L. was not a party to this suit, but had actual knowledge of the proceedings. During his operation of the railroad, the receiver paid taxes on the property and interest on L.'s mortgage. Before the order for the sale of the railway company's property, L. commenced a suit for the foreclosure of his mortgage. *Held*, that the lien of L.'s mortgage was not extinguished by the proceedings in the suit against the railway company, nor subordinated to the lien of the receiver's certificates, but that his right to foreclosure of his mortgage was unimpaired. *Union Trust Co. v. Illinois Midland R. Co.*, 6 Sup. Ct. 809, 117 U. S. 434, distinguished.

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

Frederick Bausman, for appellant.

Morris B. Sachs, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellee was the complainant in a suit brought to foreclose a mortgage on certain real property in the city of Seattle. His supplemental bill alleged, in substance, that on May 14, 1884, the Western Mill Company, a corporation, executed its promissory note to the complainant in the sum of \$20,000, payable three years after date, with interest at 9 per cent. per annum, and to secure the same executed its mortgage on certain lots in the city of Seattle; that the interest on said note and mortgage has been paid to December 14, 1893, but not thereafter; that on October 14, 1891, the mortgagor sold and conveyed the said mortgaged premises to the Ranier Power & Railway Company, a corporation, and that on or about February 13, 1895, in a cause pending in the circuit court of the United States for the district of Washington, in which A. P. Fuller was complainant and the Ranier Power & Railway Company was defendant, the master in chancery of said court executed and delivered to A. M. Brookes, Angus McIntosh, and Frederick Bausman, who were the purchasers of said lots at a sale had to satisfy the decree rendered in said cause, a deed of sale to said mortgaged premises, and that on February 12, 1895, the said McIntosh, Brookes, and Bausman conveyed the same unto the Third Street & Suburban Railway Company; that the interest of said