

Cincinnati City Vs. Morgan

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Decided On : 1865

Appeal No. : 70 U.S. 275

Appellant : Cincinnati City

Respondent : Morgan

Judgement :

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SYLLABUS

1. The properly constituted authorities of a municipal corporation may bind the corporation whenever they have *power* to act in the premises.
2. To acquire, as against all mortgagees and encumbrances, a lien by statute upon the *corpus* of a railroad, in virtue of credit advanced, it is necessary that the statute express in terms not doubtful the intention to give

a lien. The fact that, on one side, by not making a particular clause in the statute operate as a lien on the road, you leave it but declaratory of ordinary law, is not enough to give a lien when, on the other, by making the clause so operate, you would give one where the parties have declined to *take one in ordinary form* and contracted for a pledge of the *capital stock* of the road.

Ex. gr. The Ohio Legislature, authorizing the City Council of Cincinnati to issue its bonds for \$1,000,000 to a certain railroad, enacted:

"That it shall be the duty of the said city council, and it is hereby authorized to contract with the said company, to secure, by mortgages, transfers, or *hypothecations of stock* of said company, or by such *other liens or securities*, real or personal, as may be mutually agreed on, the payment of the amount of the principal of such bonds as may become due, and for the reimbursement of the interest upon the same, which shall have been paid by the city, *and for the further purpose of the securing the city against all loss or losses which the same may suffer, whether by the payment of the said principal or interest, or any damages arising therefrom, that the above described liens, mortgages, or other securities, shall have priority or precedence of all claims or obligations subsequently contracted by such company, and over other liens, securities, or mortgages which were not duly entered into between the company and other persons, before the respective issues and loans aforesaid.* "

The city, having first resolved, as a popular vote had apparently contemplated that it should do, to lend its bonds on a mortgage of *"the property of the company,"* took afterwards a hypothecation, mortgage, and pledge of twenty thousand shares of its *" capital stock."*

Held, that neither by the terms of this statute, nor by certain other statutes, relied on as helping out the lien, nor in any other way, was a lien on the *road* given to the city as against subsequent mortgagees.

By an act passed by the Legislature of Ohio, 20th March, 1850, the City of Cincinnati was authorized to issue its bonds to the amount of \$1,000,000, to be lent to the building of railroads terminating in the city, or to be subscribed to their capital stock, on a vote of the qualified voters of the city, and of the city council. The Ohio & Mississippi was one of these roads. A vote was obtained in favor of this railroad company, agreeing to the issue of bonds to the amount of \$600,000 of the city, to be secured by a mortgage upon such property of the company as the City Council should require.

The seventh section of this act of 1850 provided, in substance, as follows:

"That it shall be the duty of the said city council, and it is hereby authorized, to contract with the said companies, to secure, by mortgages, transfers, or hypothecations *of stock* of said company,

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or by such *other liens or securities, real or personal*, as may be mutually agreed on, the payment of the amount of the principal of such bonds as may become due, and for the reimbursement of the interest upon the same, which shall have been paid by the city; and for the *further* purpose of the securing the city against *all* loss or losses which the same may suffer, whether by the payment of the said principal or interest, or any damages arising therefrom, that the above-described liens, mortgages, or other securities shall have *priority or precedence of all* claims or obligations *subsequently* contracted by such company, and over other liens, securities, or mortgages which were not duly entered into between the company and other persons, *before* the respective issues and loans aforesaid."

The ordinance of the city in respect to the security for its loan, as above authorized, was thus:

"That before the bonds, or any part thereof, shall be delivered over to the said company, it shall mortgage, hypothecate, pledge, and deliver to the city, \$1,000,000 of the capital stock of said company, under seal, and shall authorize the city council to sell and dispose of so much of the stock as will realize the

aforesaid sum of \$600,000; said stock to be sold at such times, in such sums, and upon such terms as the city council may determine; and appropriate the proceeds in such manner as the same may direct."

The terms mentioned in this ordinance were assented to by the company, and a certificate was duly issued, stating that the City of Cincinnati

"is the owner of twenty thousand shares of the capital stock in the Ohio & Mississippi Railroad Company, transferable on the books of the company, at the Cincinnati office, upon surrender of this certificate."

The certificate was endorsed:

"This stock is issued, mortgaged, hypothecated, and pledged to the City of Cincinnati, as security for the loan of the bonds of the city for \$600,000,"

&c.;

This certificate of stock was accepted by the city council and deposited with the city treasurer, and bonds of the city

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were soon after issued to the company to the amount of the \$600,000.

Subsequently to this transaction the railroad company made different mortgages of their road and its fixtures, and a bill of foreclosure having been filed under one of them -- the second -- and the City of Cincinnati made a party defendant, the city put in an answer, alleging, among other things, that she had lent to this railroad company her bonds to the amount of \$600,000, and had a lien on the road as security paramount to any mortgage. This was denied by the holders of the bonds under the second mortgage, and, whether the city had or had not such a lien, was the question.

To understand the argument made here by the city's counsel, and which sought to support the lien, if support was wanted, by reference to other statutes of Ohio, it

may be necessary to add:

1st. That prior to the date of these transactions, or of the Act of 20 March, 1850, there was a law in force in Ohio, known as the General Railroad Law. This law -- the provisions of which, it was said, had been extended to the Ohio & Mississippi Railroad (originally incorporated in Indiana) -- gave power, by its 13th section, to railroad companies to borrow money, and to execute bonds or notes therefor; and in order to secure the payment thereof, to pledge their property and income; "provided," the act went on to say,

"that the value and security of any liens, mortgages, or the stock held in or *against* such company *by the state or the City of Cincinnati*, should not thereby be injured or otherwise impaired."

2d. That subsequent to the Act of March 20, 1850, an Act of February 10, 1851, authorizing the city to subscribe to another railroad -- the Cincinnati Western -- was passed; which act contained, in one of its sections -- the 15th -- exactly the same language as has been presented, *supra*, pp. 70 U.S. 276|276-277, as making the 7th section of the Act of March 20, 1850, now under consideration, but contained *in addition* the following as its 16th section:

"That the City Council of the City of Cincinnati shall not lend

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her credit or issue her bonds to this or any other railroad company, unless the *private stockholders mortgage a sufficient amount of real estate, in addition to the road and other effects of said company or companies, as security for the lending of her credit or issuing of such bonds by said city.* "

Certain other incidents of the case may be mentioned; as,

1. That the original proposition made by the city councils to the people, to be voted on, was whether the city should issue the \$60,000, to "be secured by a *mortgage* upon such property of *the company* as the city council shall require," and that this was the question voted on.

2. That when, after the popular vote authorizing the loan of the city's credit, the city directed its president of council to execute, issue, and deliver the bonds to secure the said loan, it did so reciting the loan as one "which shall be by mortgage on the said road."

3. That subsequently to this date another ordinance was passed:

"That so much of the before-recited ordinance as requires the loan of \$600,000 to said company, to be secured by a mortgage on said road, be hereby repealed, provided, that before the bonds, or any part thereof, shall be delivered over to said company, the said company shall mortgage, hypothecate, pledge, and deliver to said City of Cincinnati, one million of dollars of *the capital stock* of said company, under seal, authorizing the city council to sell and dispose of so much of the stock as will realize the aforesaid sum of \$600,000; said stock to be sold at such times, in such sums, and upon such terms as the city council may determine, and appropriate the proceeds in such a manner as said council may direct; provided further, that said company shall oblige itself, by writing under seal, in case of failure to pay interest upon said loan, to transfer to said City of Cincinnati a sufficient amount of the capital stock of said company, with authority to sell the same, as will realize the amount of interest unpaid."

The court below -- considering that the pledge was but of *certificates of stock*, one of the forms of security allowed by the 7th section of the act of 20th March, 1850, and that

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neither the 13th section of the general law incorporating railroads, nor the 16th clause of the Act of February, 1851, incorporating the Cincinnati Western Railroad Company, and which required a pledge of the private property of the stockholders applied to the case -- decreed that the city had no lien whatever on any property of the railroad, except upon the stock pledged to it. And an appeal was now here.

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MR. JUSTICE NELSON delivered the opinion of the Court.

There is no doubt but that every part of this transaction was within the competency of the city council, on the one side, and the railroad company on the other, as derived from the act of the legislature of Ohio, already referred to, of the 20th March, 1850, and was valid and binding upon both the parties. The seventh section of this act confers the authority in express terms. The city council is authorized to contract with the railroad company, to secure, by mortgages, transfers, or hypothecations of their stock, or by such other liens or securities, real or personal, as may be mutually agreed upon, for the payment of the amount of the principal of the bonds as they become due, and for the reimbursement of any interest that might be paid by the city.

The question in the case is, what are the rights acquired by the city, on the one hand, and obligations assumed by the railroad company, on the other, by this arrangement?

If we look simply to the contract between the parties, it is impossible to entertain any doubt about them. The city holds \$1,000,000 in the stock of the company, as a security for the loan of \$600,000 in city bonds, with a power of sale of the stock upon the terms mentioned. The whole transaction consists in a loan of bonds and a pledge of stock.

It is argued, however, that this seventh section of the act of 1850 impresses upon the transaction an effect and operation over and beyond the mere rights and obligations arising out of the contract; that the section transmutes the pledge of stock into a lien or mortgage upon the road and fixtures of the company, and makes it not only a charge upon them, but a charge prior in date to the second, and even the first mortgage; that, in effect, the pledge overrides all liens or

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encumbrances upon the road and fixtures, whether prior or subsequent in time, and postpones them to this alleged statute security of the loan of the city bonds. Certainly a statute that can have such a peculiar and strikingly inequitable effect

and operation, should be very explicit and positive, in order to obtain the assent of a court of law or equity.

The lien is supposed to be given by the latter clause of the section, which is in substance as follows:

"And for the further purpose of securing said city against all loss or losses which the same may suffer, whether by payment of the principal or interest, or any damages arising therefrom, that the above liens, mortgages, or other securities shall have priority or precedence of all claims or obligations subsequently contracted by such company, and over other liens, securities, or mortgages which were not duly entered into between said company and other persons, before the respective issues and loans."

It will be remembered that the first clause in the section gave to the city council an option as to the security they might take for the advance of the bonds. They might take mortgages, or hypothecations of stock of the company, or such other lien or security, real or personal, as the parties should mutually agree to between themselves. The liens and securities, therefore, real or personal, that the city council might require, depended upon their own views of what would be best for all the parties interested in the enterprise of building the road. They could have exacted a mortgage upon the road or fixtures, or both, or be satisfied with personal security, such as the hypothecation of stock. They did, at first, decide in favor of a mortgage on the road, but soon afterwards changed their opinion in favor of the hypothecation of stock -- exacting a \$1,000,000 of stock for the \$600,000 in their bonds. Now "the above-described liens, mortgages, and securities," referred to in the subsequent clause of the section, and to which priority and precedence are given over claims and obligations subsequently entered into, is to be taken distributively -- that is, if the city council should stipulate for a lien by way of mortgage, upon the road, or upon personal property belonging to the

company, or which might be acquired in the future, such liens or mortgages should have priority and precedence over claims and obligations subsequently contracted by the company.

The only answer to this view is that it makes the clause a work of supererogation, as this would be the legal effect of the lien itself. That is true. The clause would be but declaratory of the law as it stood. This, however, is not a strange circumstance in legislation. A large portion of the modern codes is but declaratory of the common law as expounded by the courts. We prefer this interpretation to the one that gives a lien against the stipulations of the parties, and where both were free to enter into them as authorized by a previous clause of the same section. Under this liberty, given to the city council and the company, the former rejected the lien upon the road by mortgage, preferring the personal security by a pledge or hypothecation of the stock.

The first clause of this section would be quite as idle and absurd a piece of legislation, which conferred upon the parties the authority of agreeing upon their own terms as to the nature and character of the security for the loans, as the latter, if, by the latter clause, whatever might be the security agreed upon, it must operate as a mortgage on the road, and have precedence over all others. Why give this choice of securities, if this would be the result? There was no necessity to stipulate for a mortgage on the road, if the statute gave the lien without it; nor propriety or sense in the choice between a mortgage and the pledge of stock, if a lien on the road followed either security.

The thirteenth section of the general law incorporating railroads, referred to as helping out this lien, we think, received its proper answer in the court below, as not applicable to this company, and the same in respect to a clause in the Act of February 10, 1851, incorporating the Cincinnati Western Railroad Company.

We think the decree of the court below, against the claim of the city, was right, and should be

Affirmed.

