

Vane Vs. Newcombe

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Appeal No. : 132 U.S. 220

Appellant : Vane

Respondent : Newcombe

Judgement :

Vane v. Newcombe - 132 U.S. 220 (1889)

U.S. Supreme Court Vane v. Newcombe, 132 U.S. 220 (1889)

Vane v. Newcombe

No. 69

Argued and submitted November 6, 1889

Decided November 25, 1889

132 U.S. 220

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF INDIANA

SYLLABUS

In Indiana, a person who contracts with a telegraph corporation to do the specified work of putting up certain lines of wire on poles is not an "employee" of the corporation within the meaning of the Act of the Legislature of Indiana, approved March 13, 1877, Laws of Indiana 1877, Special Session, 27, c. 8; also, Rev.Stats. Indiana, §§ 5286-5291, giving a first and prior lien on the corporate property and earnings of a corporation to its employees for all work and labor done and performed by them for the corporation from the date of their employment by the corporation.

Such a lien is not given to him by virtue of the Mechanics' Lien Act of Indiana, of March 6, 1883, Laws of 1883. 140; Elliott's Supplement of 1889, §§ 1688 and 1690, unless he complies with that act in regard to describing, in his notice of lien, the lot or land on which the structure stands on which he claims a lien.

By perfecting a claim to his lien under the act of 1877, he waived the right, if any, which he had to a common law lien as to the personal property and earnings of the corporation.

The poles and wires were real estate on which he could have no lien at common law.

Moreover, he gave up any right he had to a common law lien as to the wires by giving up possession of them.

On the filing of a bill in equity in October, 1884, in the Circuit Court of the United States for the District of Indiana by the Bankers' & Merchants' Telegraph Company of Indiana, an Indiana corporation, against the Bankers' & Merchants' Telegraph Company of New York, a New York corporation, praying for an accounting between the defendant and the plaintiff as to moneys due by the former to the latter, and for a determination of the relative rights of the parties to certain telegraph lines and property in Indiana, and for the appointment of receivers *pendente lite* to take possession of the lines and property, an order was made by the court appointing Richard S. Newcombe and James G. Smith receivers of all

the lines and property of the plaintiff and the defendant, or either of them, situated within the jurisdiction of the court.

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The same persons had been appointed receivers of the defendant in a suit brought by one Day in the Supreme Court of the State of New York.

In March, 1885, James E. Vane filed in the suit in the circuit court an intervening petition. It set forth that in June, 1884, the defendant had employed Vane to put six additional wires on and along the telegraph poles then owned by the defendant, from Freeport, Ohio, to Hammond, Indiana, and to attach such wires to the proper fixtures and appendages to the poles so that the company might have six additional independent wires between those places, and agreed with Vane to pay him, as compensation for the work, \$45 for every mile of wire put and strung upon the poles, the defendant agreeing to furnish all of the wire and other necessary material, which were to be delivered at the nearest distributive point along the route of the line, and to pay all freight for their shipment to the various points along the route, and to deliver them to Vane free of any charge at such points. The petition further alleged that in June, 1884, the defendant directed Vane to construct two lines westwardly from Hammond in the direction of Chicago, Illinois; that he proceeded to erect and construct such two lines to a point about ten miles east of the courthouse in Chicago; that the defendant had failed to pay the freights on the wire and materials; that Vane, at its request, had furnished money to pay such freights, and also money to purchase necessary materials used in making the line; that the defendant had committed other breaches of its agreement with Vane, and in consequence owed him a large sum of money; that he had executed the work in all things as directed by the defendant; that when he had completed the six lines to Lake Station, in Lake County, Indiana, the defendant owed him about \$16,000; that he then disconnected the six wires from their westerly connections, and held physical possession of them for his own protection; that while he so held them in their disconnected condition, the receivers, Newcombe and Smith, entered into the following agreement with him in consideration that he would allow the lines to be connected with other lines running westerly into

Chicago:

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"Chicago, Ill., Nov. 19th, 1884"

"It is hereby agreed and understood that the telegraph wires on the poles of the Bankers' & Merchants' Telegraph Company in the State of Indiana, which were strung by J. E. Vane, and upon which he claims a lien, shall be connected up with the wires of the said company from Hammond, Indiana, to Chicago, Illinois, now constructed and to be constructed, and shall be used for telegraph business by the receivers of said company, but it is also expressly understood that such use of said wires shall not be construed in any way or to any extent as impairing or interfering with the lien of the said Vane thereon."

"RICHARD S. NEWCOMBE"

"JAS. G. SMITH, *Receivers* "

that in September, 1884, he caused notice to be given to the defendant of his intention to hold a lien upon its corporate property and earnings, for all work and labor done and performed and all moneys advanced by him to and for its benefit at its instance and request, and for that purpose filed notices, on the 18th and 19th of September, 1884, in the offices of the recorders of seven counties in Indiana through which the telegraph line runs, the notices being dated September 15, 1884; that the receivers also owed him \$1,898.33 for work which he did for them after their appointment, in connecting said wires at Lake Station and Hammond with their westward connections, under which employment he erected and completed the wires to a distance of about four miles from the courthouse in Chicago, such indebtedness including also the purchase by him of a large amount of materials and the payment of freight bills and the doing of other work, and that the receivers also owed him other moneys, which he had paid for the wages and expenses of men who performed work for the receivers in respect of the telegraph line between December, 1884, and February, 1885. The petition prayed for the

payment of the claim of Vane out of the first moneys coming into the hands of the receivers, as a superior lien to all claims except those of a like class.

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The lien covered by the notices purported to be claimed under the Act of the Legislature of Indiana approved March 13, 1877. Laws of Indiana, 1877, Special Session, c. 8, 27; also Rev.Stat. Ind. 1881, §§ 5286-5291.

Sections 1 and 2 of the Act of 1877, being sections 5286 and 5287 of the Revised Statutes, provide as follows:

"SEC 1. *Be it enacted by the General Assembly of the State of Indiana* that the employees of any corporation doing business in this state, whether organized under the laws of this state or otherwise, shall be, and they are hereby, entitled to have and to hold a first and prior lien upon the corporate property of any corporation, and the earnings thereof, for all work and labor done and performed by such employees for such corporation, from the date of their employment by such corporation, which lien shall lie prior to any and all liens created or acquired subsequent to the date of the employment of such employees by such corporation except as in this act provided."

"SEC. 2. Any employee wishing to acquire such lien upon the corporate property of any corporation or the earnings thereof, whether his claim be due or not, shall file in the recorder's office of the county where such corporation is located or doing business notice of his intention to hold a lien upon such property and earnings aforesaid for the amount of his claim, setting forth the date of such employment, the name of the corporation, and the amount of such claim, and it shall be the duty of the recorder of any county, when such notice is presented for record, to record the same in the record now required by law for notice of mechanics' liens, for which he shall receive twenty-five cents, and the lien so created shall relate to the time when such employee was employed by such corporation, or to any subsequent date during such employment at the election of such employee, and shall have priority over all liens suffered or created thereafter, except other

employees' liens, over which there shall be no such priority, *provided* that where any person other than an employee shall acquire a lien upon the corporate property of any corporation located or doing business in this state, and such lien remain

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a matter of record for a period of sixty days in any county in this state where such corporation is located or doing business, and no lien shall have been acquired by any employee of such corporation during that period, then and in that case, such lien so created shall have priority over the lien of such employee in the county where such corporation is located or doing business, and not otherwise, *provided further* that this section shall not apply to any lien acquired by any person for purchase money."

The notices of lien filed by Vane were all in the following form, the name of the county being different in each case:

"De Kalb County"

"Notice is hereby given to the Bankers' and Merchants' Telegraph Company, incorporated and organized under the laws of the State of New York, doing business in the County of De Kalb, in the State of Indiana, and all others interested:"

"You are hereby notified that I, James E. Vane, hereby intend to hold a lien upon the poles and wires strung thereon, the switchboards, telegraph instruments and battery, and all other fixtures and property of said company, together with all the earnings of said company in said County of De Kalb. I hold this lien for work and labor done and performed and materials furnished in the construction of their line of telegraph through said county, and at their special instance and request, to the amount of sixteen thousand dollars. The labor was performed and materials furnished on and after the 15th day of June, 1884. That he intends to hold this lien upon all the poles, wire strung and unstrung, switchboards, telegraph instruments and batteries, whether, in use or not, and all fixtures and property belonging to

said company in said County of De Kalb, together with earnings thereof, until his claim is paid and satisfied."

"September 15, 1884 JAMES E. VANE"

The receivers put in an answer to the petition, setting up that as to so much of it as sought to enforce a lien upon the telegraph property and its rents and incomes Vane did not

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occupy, in his transactions with the defendant, the relation of an employee, but of a general contractor, and was not entitled to claim or enforce a lien; that he was not entitled to a first lien because, before he filed his petition, the receivers had executed, under an order of the supreme court of New York and under the direction of the circuit court, receivers' certificates to the amount of \$130,000, to be used in the payment of the debts of the defendant, and \$20,000, to be used to complete the construction of its telegraph lines, which certificates were made, by an order of said supreme court, dated November 3, 1884, and an order of the circuit court, dated December 15, 1884, a first charge and lien upon all the property of the defendant within the State of Indiana; that in pursuance of those orders, the receivers had executed, acknowledged, and recorded a mortgage bearing date November 7, 1884, to secure the payment of the receivers' certificates; that those certificates, to the amount of \$150,000, were outstanding in the hands of persons who took them as innocent purchasers without notice, and that, long before the rendering of the services by Vane, the defendant had executed, acknowledged, and recorded a general mortgage upon all its property in Indiana as well as the other states through which its lines extended, covering its franchises, rents, and profits, to secure an issue of bonds amounting to \$10,000,000, which were outstanding, unpaid, and in the hands of persons who took the same for value and without notice of any equities against the same. A replication was put in to this answer, and on the 16th of May, 1885, the petition of Vane was referred to a master to take evidence and report the same with his findings thereon.

On the 30th of January, 1886, the master, having taken the evidence produced by the parties, filed his report, containing the following statements:

"Mr. Vane, the petitioner, was employed by the telegraph company to put on arms and insulators and to string additional wires on the poles of the company from Freeport Junction, Ohio, to Lake Station, Indiana, a distance of 248 miles, for \$45 per mile. The company agreed to furnish and deliver to Vane at the nearest accessible railway stations all the necessary

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material for the work. Vane was to do or furnish the labor necessary to string the wires, etc. He did the work, hiring men for the purpose and assisting in person. The amount owing to him on this account is eleven thousand one hundred and sixty dollars (\$11,160.)"

"He also put in cross-arms and insulators and strung four wires from Lake Station to Hammond, sixteen miles at thirty-seven dollars and fifty cents per mile, the company furnishing material and Vane doing or furnishing the labor. The amount owing to him on this account is six hundred dollars (\$600). "

"He also strung two wires from Hammond to the junction of the Chicago Board of Trade lines, 28 miles at \$20 per mile, for which there is due him five hundred and sixty dollars (\$560)."

"During the progress of the work, the company failed to furnish the material as it was required, so that the men working for Vane were without employment a portion of the time. Vane asked for instructions, and was directed by the company to keep his men together during the delay thus caused, it being the understanding that the company would pay their board while they were waiting. The master is of the opinion that it is to be fairly inferred from the evidence that the company would pay for the time thus lost, Vane being required to pay his men as if they were at work."

"Vane also made some advances for freight on material shipped to him, but which he could not obtain possession of until the freight was paid. He also paid out various sums of money for livery hire, telegrams, etc., made necessary by the company's failure to furnish material promptly."

"He also did extra work on the line at the request of the company which was not covered by the original agreement. The amount due him for this extra work and for the time of his men lost by delay is \$1,951.12. The amount due him for cash advanced to pay freight, livery hire, telegrams, etc., is \$1,298.50."

"August 11, 1884, he was paid \$300; September 11, \$200; total credits, \$500."

"Exhibit No. 1, which was filed March 7, 1885, contains all

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the foregoing items in detail, and has been audited and approved by the company. There is no controversy as to the amount. The only real question is as to what preference or lien, if any, has the intervenor."

"The master is of the opinion that in doing this work, Mr. Vane was an employee of the company within the meaning of section 5286, Rev.Stat.Ind. 1881. He has filed his notice, as required by section 5287, in the counties through which the telegraph is built. This lien covers the following items:"

For stringing wires, 248 miles, \$45 per mile . . . \$11,160.00

For putting in cross-arms from Lake Station

to Hammond 600.00

For stringing 2 wires from Hammond to

Junction, etc. 560.00

For extra work and delay 1,951.12

\$14,271.12

Deduct credits 500.00

Bal. due \$13,771.12

"I find and report that he has no lien as to the sum of \$1,298.50 for cash paid for freight, livery, etc."

"Vane's claim accrued prior to the order made by the Supreme Court of New York, November 3, 1884, authorizing the issue of \$150,000 of special receivers' certificates, to secure which a trust deed or mortgage was executed, and I report and find that, for said sum of \$13,771.12, Vane is entitled to priority over the lien of the certificates above named."

Vane also asserts a right to a common law lien, which he bases on the following facts, which are not controverted: the contract with Vane was made in June, 1884. November 12, 1884, the work was practically done, but the connections were not made. Mr. Vane kept possession of the wires by refusing to allow connections to be made, and turned the ends of the wires down into the ground. He retained such possession

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until November 20, 1884, when he delivered possession to the receivers with an agreement that such delivery was not to impair any rights or liens he might thus have by virtue of such possession. He had such possession when the order allowing the issue of receivers' certificates was made and also when the certificates were issued, November 11, 1884. I report and find that, by perfecting his claim for a lien under the statute, Mr. Vane waived the right he had, if any, to assert his common law lien.

"In addition, there is due to Vane from the receivers, for work done for them, \$1,898.33. The work was done after the certificates were authorized by the order of November 3, 1884, but before the issue of the certificates issued by subsequent orders. I report and find that for the sum last named, Vane should be postponed as to the issue of \$150,000 of certificates, but that he should be preferred as to those which were subsequently issued."

In February, 1886, the receivers filed exceptions to the report of the master because of his allowance to Vane of a lien for the \$13,771.12, on the ground that he was an employee of the defendant within the meaning of section 5286. The exceptions claimed that Vane was a contractor in his agreement with the defendant, and not its employee; that the item of \$600 for putting in cross-arms was not covered by his notice of lien nor by the contract under which the labor was performed, and that he had no lien for that service, and they made a like claim in regard to the item of \$1,951.12.

Vane filed exceptions to the report because the master had found that he was not entitled to a lien for the \$13,771.12 paramount to the holders of receivers' certificates and all other mortgage liens, and had not found that Vane was entitled to a paramount lien over all such other liens for the entire amount of \$15,069.62, and had deducted the \$500 from the \$14,271.12, and not from the \$1,298.50, and had not awarded a lien for the \$1,298.50.

The case was heard on these exceptions by Judge Woods, holding the circuit court. His opinion, delivered in April, 1886, 27 F. 536, recites the material findings of the

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master, and then says:

"In the opinion of the court, the petitioner had no lien at common law or in equity, and was not an employee of the telegraph company within the meaning of the statute referred to by the master. That statute provides that"

"the employees of any corporation doing business in this state . . . shall be . . . entitled to have and hold a first and prior lien upon the corporate property . . . and the earnings thereof for all work and labor done . . . by such employees for such corporation."

"To be entitled to the benefits of this statute and others of like character since enacted, I think it clear that the employee must have been a servant, bound in some degree at least to the duties of a servant, and not, like the petitioner, a mere contractor, bound only to produce or cause to be produced a certain result -- a result of labor, to be sure -- but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party. In respect to the sums found due the petitioner, the report is confirmed, but, to the allowance of a lien, exceptions sustained."

In pursuance of this decision, the court made an order overruling the exceptions of Vane and sustaining so much of the exceptions of the receivers as related to the claim for a lien in favor of Vane, but confirming the report as to amounts found to be due to Vane. The order adjudged that Vane had no lien upon the property of the defendant for the \$15,069.62; that that sum was a general floating debt of the defendant, not entitled to any priority, but that the \$1,898.33 was a valid debt of the receivers, payable out of any funds in their hands as such, available for payment of the debts of the trust. Vane has appealed to this Court from so much of the decree as disallows his claim for a lien for the \$15,069.62, and from the overruling of his exceptions and the sustaining of the exceptions of the receivers.

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MR. JUSTICE BLATCHFORD, after stating the case as above reported, delivered the opinion of the Court.

It is contended for Vane that he has a lien under section 1 of the Act of 1877 (section 5286 of the Revised Statutes). That section gives a first and prior lien upon the corporate property of any corporation doing business in Indiana, whether organized under the laws of that state or otherwise, and upon the earnings of such

corporation, to its employees for all work and labor done and performed by them for the corporation from the date of their employment by it.

It seems clear to us that Vane was a contractor with the company, and not an employee, within the meaning of the statute. We think the distinction pointed out by the circuit

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court is a sound one -- namely that to be an employee within the meaning of the statute, Vane "must have been a servant, bound in some degree at least to the duties of a servant, and not," as he was,

"a mere contractor, bound only to produce, or cause to be produced, a certain result -- a result of labor, to be sure, but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party."

It is to be noted that the statute gives a lien to employees of the corporation only for work and labor done and performed by them for the corporation. It does not give a lien for the value of materials furnished, nor for advances of money made. It is confined to work and labor done and performed and to work and labor done and performed by employees of the corporation, and to work and labor done and performed by employees of the corporation for the corporation. In this respect, there is a marked difference between the provisions of section 5286 and the provisions of section 15 of the Act of March 8, 1879 (Laws of 1879, 22; § 5471, of the Revised Statutes of 1881), which gives a lien in coal mines on the mine "and all machinery and fixtures connected therewith, including scales, coal bank cars, and everything used in and about the mine," to

"the miners and other persons employed and working in and about the mines, and the owners of the land or other persons interested in the rental or royalty on the coal mined therein . . . for work and labor performed within two months, and the owner of the land for royalty on coal taken out from under his land for any length of time not exceeding two months."

This miners' statute gives a lien to all persons "employed and working in and about the mines" for work and labor performed by them, without stating that they must be employees of the owners of the mine or of the persons working it, or of the persons owning the machinery and fixtures, and without stating that they may not be persons working in and about the mine, employed by contractors doing work under contract for the owners of the mine, or for the owners of the machinery and fixtures. The general mechanics' lien law of Indiana, (§ 5293 of the

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Revised Statutes of 1881), subsequently reenacted by the Act of March 6, 1883, Laws of 1883, 140, provided that

"mechanics and all persons performing labor or furnishing materials for the construction or repair of any building or who may have furnished any engine or other machinery for any mill, distillery, or other manufactory may have a lien separately or jointly upon the building which they may have constructed or repaired, or upon any buildings, mill, distillery, or other manufactory for which they may have furnished materials of any description, and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both."

This mechanic's lien statute gives a lien upon a building to all persons who perform labor or furnish materials for the construction or repair of the building, even though they do it under a contract, and is not confined to employees of the owner of the building, and it also gives a lien upon a manufactory to persons who may have furnished machinery or materials for the manufactory, even though they may have done so under contract with the owner of the manufactory or under contract with the contractor with such owner.

The Supreme Court of Indiana, in *Colter v. Frese*, 45 Ind. 96, in 1873, in construing that statute, which was section 647 of the then existing Revised Statutes, held that a person who furnished materials not to the owner, but to the contractor, for the erection of a new building could acquire and enforce a lien on

the building and on the interest of the owner of the land on which the building stood to the extent of the value of the materials furnished.

In view of these provisions of other lien statutes of Indiana, the limited language of section 5286 is very marked, and justifies the interpretation that the provisions of that section are to be confined to a special class of persons. It is a rule of interpretation recognized by the Supreme Court of Indiana in *Stout v. Board of Commissioners*, 107 Ind. 343, 348, that

"in case of doubt or uncertainty, acts *in pari materia*, passed either before or after, and whether repealed or still in force, may be referred to in order to discern the intent of the legislature in the use of particular terms, or in the enactment of

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particular provisions, and, within the reason of the same rule, contemporaneous legislation, not precisely *in pari materia*, may be referred to for the same purpose."

The view above taken of the statute under consideration is supported by adjudged cases. In *Aikin v. Wasson*, 24 N.Y. 482, in 1862, it was held that a contractor for the construction of part of a railroad was not a laborer or servant within the provision of the general railroad act of New York making stockholders of a railroad corporation personally liable "for all the debts due or owing to any of its laborers and servants for services performed for such corporation."

In *Munger v. Lenroot*, 32 Wis. 541, in 1873, under a statute which gave a lien on logs or timber for the amount due for his labor or services to any person who did or performed any work or services in cutting, felling, hauling, driving, running, rafting, booming, cribbing, or towing such logs or timber, it was held that such person was entitled to such lien not only when employed by the owner of the logs or of the land from which they were cut, but also when employed by a contractor under such owner. The court was of the opinion that the legislature intended to give the lien absolutely to the laborer, regardless of the question whether he had rendered the services under a contract with the general owner or not. This decision was

based upon the special language of the statute in not excluding a person employed by a contractor.

In *Wakefield v. Fargo*, 90 N.Y. 213, in 1882, it was held that a person employed by a corporation at a yearly salary as a book keeper and general manager was not a laborer, servant, or apprentice within the provisions of a statute of New York making the stockholders of the corporation "liable for all debts that may be due and owing to their laborers, servants, and apprentices for services performed for such corporation." The view taken by the court was that the services referred to were menial or manual services; that he who performed them must be of a class who usually looked to the reward of a day's labor or service for immediate or present support, from whom the company did not expect credit, and to whom its future ability to pay was of no consequence -- one who was responsible for

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no independent action, but who did a day's work or a stated job under the direction of a superior; that the word "servant" must be limited by the more specific words "laborer" and "apprentice," with which it was associated, and be held to comprehend only persons performing the same kind of service that was due from laborers and apprentices, and that a general manager was not *ejusdem generis* with an apprentice or laborer.

In *Gurney v. Atlantic & Great Western Railway*, 58 N.Y. 358, in 1874, a case relied on by the appellant, a receiver of a railroad company was directed by an order of court to pay out of moneys in his hands "arrearages owing to the laborers and employees" of the company "for labor and services actually done in connection with" the company's road. Claim was made by a counselor at law for professional services as counsel for the railroad company rendered prior to the appointment of the receiver. The question raised was whether the language of the order covered employees who had not been in the stated and regular employment of the company. The court held that in view of the special language of the order, it included the claim for the professional services. It appeared that the order was made as the result of negotiations in regard to which the counsel under whose

advice the order was obtained testified that the word "employees" was used in the negotiations

"not in any particular or strict sense, but according to its ordinary and general meaning, as including attorney's compensation as well as that of other persons employed by the corporation."

The decision appears to have gone upon the ground that the person who made the claim had rendered "services" in connection with the railroad, and was consequently an employee, within the meaning of the order.

We are therefore of opinion that Vane had no lien under the Act of March, 1877, § 5286 of the Revised Statutes.

It is further contended that Vane had a lien by virtue of the general mechanic's lien law, before referred to, which was reenacted by the Act of March 6, 1883, Laws of 1883, p. 140; Elliott's Supplement of 1889, §§ 1688, 1690, in the following language:

"SECTION 1. *Be it enacted by the General Assembly of the*

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State of Indiana that mechanics, and all persons performing labor or furnishing material or machinery for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water works, or other structure may have a lien, separately or jointly, upon the house, mill, manufactory or other building, bridge, reservoir, system of water works or other structure which they may have erected, altered, repaired, or removed or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or land on which it stands or with which it is connected, to the extent of the value of any labor done or materials or machinery furnished, or both."

"SEC. 3. Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county at any time within sixty days after the performing of such labor or furnishing such materials or

machinery notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth therein the amount claimed, and giving a substantial description of such lot or land on which the house, mill, manufactory, or other building, bridge, reservoir, system of water works, or other structure may stand or be connected with or to which it may be removed. Any description of the lot or land in a notice of lien will be sufficient if, from such description or any reference therein, the lot or land can be identified."

In regard to this, it is sufficient to say that the notice of lien filed by Vane in September, 1884, did not comply with section 3 of the statute, in regard to a description of the "lot or land" on which the structure stood upon which he claimed a lien.

A common law lien and an equitable lien are also claimed. As to the common law lien, the master reported "that, by perfecting his claim for a lien under the statute, Mr. Vane waived the right he had, if any, to assert his common law lien." We concur in this view as to the personal property and earnings of the corporation. As to the poles and wires, they were real estate, on which there could be no lien at common law.

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In addition to this, Vane gave up any right he had to a common law lien as to the wires by giving up possession of them on November 19, 1884. The lien referred to in the paper of that date, signed by the receivers, as a lien claimed by Vane was the statutory lien which he had attempted to secure by his notice dated September 15, 1884. Nor do we see any ground for saying that he had or retained an equitable lien.

It is also claimed that the instrument of November 19, 1884, fixed a lien upon the property. We do not so understand it. It conferred no new right upon Vane. It only refers to such lien, if any, as existed, to a lien claimed by him. Where it speaks of "the lien of the said Vane," it refers to what it had before spoken of as the lien claimed by him. The purport of the paper is simply that the use of the wires by the

receivers shall not be construed as impairing or interfering with the lien claimed by Vane, that is, with any lien which existed under the statute under which he had given and filed his notices, dated September 15, 1884.

Decree affirmed.

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