1958
*Dec. 3
1959
Feb. 26

THE CANADIAN BANK OF COMMERCE (*Defendant*) ..... APPELLANT;

AND

T. McAVITY & SONS, LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Construction of sewers and mains on public highways for subdivision owner—Claim for price of materials supplied—Assignment of book debts by contractor—Whether sums received from owner by assignee held in trust—Whether trust dependent on right of lien—Whether contractor a "contractor" within the Act—The Mechanics' Lien Act, R.S.O. 1950, c. 227, ss. 1, 2, 3, 5.

The plaintiff company claimed the price of materials supplied to S Co. and used by the latter, under a contract with a subdivision owner, for the construction of sewers and water mains on public streets and highways. The money owed to S Co. under its contract was paid to the defendant bank as assignee under a general assignment of book debts from S Co. The trial judge held that the bank was a trustee of the money. This judgment was affirmed by the Court of Appeal. The bank appealed to this Court and argued that s. 2 of *The Mechanics' Lien Act*, which provides that "nothing in this Act shall extend to any public street or highway", rendered s. 3 inapplicable to money payable in respect of work done on such street or highway; and further, that since no lien could arise in consequence of the work, S Co. was not a "contractor" within the Act.

Held: The defendant bank was a trustee of the money under s. 3(1) of the Act.

Per Rand, Cartwright, Abbott and Martland JJ.: The effect of s. 2 was simply to remove certain works on highways from the application of the second object of s. 5, which was to provide a lien, but that did not affect or diminish the kinds of works which were the "purposes", in the sense used in s. 1(*a*), of the Act as being the objects of construction contracts. Section 3 dealt with the "contractor" in a new aspect; it created the equivalent of a lien on the money and it assumed a contract for a work mentioned in s. 5. The two securities, the land, and the moneys, were completely independent on one another. The clearest language would have to be found to hold, as it was argued by the defendant, that where no lien can arise no beneficial interest can be created in the moneys. It would defeat the fundamental object of the statute to deny this trust, while giving additional security to those already entitled to a lien.

Per Locke J.: The work contracted for fell within the general description of works mentioned in s. 5, and the fact that its performance did not give rise to a lien was immaterial in deciding whether S Co. was a "contractor" as defined in the Act. The circumstance that no right of lien arose was of no more consequence than was the fact that the right of lien had been lost in *Minneapolis Honeywell Regulators Co. v. Empire Brass Co.*, [1955] S.C.R. 694. The right given to a material man to resort to the moneys paid to the contractor under s. 3 was quite distinct from the right to a lien given by s. 5.

Section 2 was designed to prevent a lien upon a public street or highway but its language was not designed to affect the right given to material men by s. 3(1) and did not include it.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Judson J. Appeal dismissed.

Honourable R. L. Kellock, Q.C., and *W. H. C. Boyd, Q.C.*, for the defendant, appellant.

W. T. Smith, Q.C., and *G. W. McLean*, for the plaintiff, respondent.

The judgment of Rand, Cartwright, Abbott and Martland JJ. was delivered by

RAND J.:—This appeal arises out of the construction of sewers and water mains with their appurtenances in public highways by the Spartan Contracting Company under a contract with J. A. Bailey Limited, the owners of land known as the "Beverley Hills Subdivision". The claim made by the respondent is for the price of materials supplied to the contractor. The appellant holds a general

[1] [1958] O.W.N. 324, 14 D.L.R. (2d) 153, 37 C.B.R. 1.

1959

CDN. BANK OF COMMERCE v. McAVITY & SONS LTD.

Rand J.

assignment of book debts from the contracting company which includes such moneys as those owing under the contract.

The claim is made under s. 3 of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, which, in subs. (1), provides:

(1) All sums received by a builder or contractor or a subcontractor on account of the contract price shall be and constitute a trust fund in the hands of the builder or contractor, or of the subcontractor, as the case may be, for the benefit of the proprietor, builder or contractor, subcontractors, Workmen's Compensation Board, workmen and persons who have supplied material on account of the contract, and the builder or contractor or the subcontractor, as the case may be, shall be the trustee of all such sums so received by him, and until all workmen and all persons who have supplied material on the contract and all subcontractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, may not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

The defence is that the subsection does not apply to the work or the contract because of s. 2 of the Act:

2. Nothing in this Act shall extend to any public street or highway, or to any work or improvement done or caused to be done by a municipal corporation thereon.

Mr. Kellock puts his case thus: s. 1(*a*) defines "contractor" as follows:

(a) "contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or service or placing or furnishing materials for any of the purposes mentioned in this Act;

The word "purposes" is then carried to s. 5, subs. (1) which reads:

(1) Unless he gives an express agreement to the contrary and in that case subject to section 4, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them for any owner, contractor, or subcontractor, shall by virtue thereof have a lien for the price of the work, service or materials upon the estate or interest of the owner in the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner,

and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent shall be good and sufficient delivery for the purpose of this Act, but delivery on the designated land shall not make such land subject to a lien.

Interpreting the language of these subsections, he argues that the "purposes" mentioned in the Act are those enumerated in s. 5(1) and that by reason of s. 2 there is excised from them such works as those in question: these later are to be deemed to be specifically and for all purposes struck out of the statute. As, then, a "contractor" is one who contracts to do work "for any of the purposes mentioned", the Spartan Company was not such a contractor, and s. 3 did not impose any trust on the moneys received by it from the owner of the highway.

The objects of s. 5 are two fold and disparate: the first, to mention, by enumeration, the different types, in the widest sense, of improvements on and to lands to which workmen and material suppliers, by their work and materials, have added value; and secondly, to provide a security for them on that value to which, *ex aequo et bono,* they are entitled. The effect of s. 2 is simply to remove certain works on highways from the application of the second object, the reason for which is obvious: the sale of a highway to realize a private debt is not to be seriously contemplated. But that does not affect or diminish the kinds of work which are the "purposes", in the sense used in s. 1(*a*), of the Act as being the objects of construction contracts; the description remains as it was, in terms unrelated to any particular land or owner.

The language of s. 2 confirms this view. It declares that "Nothing in this Act" shall "extend" to a highway or to any work or improvement to a highway. In what respect can "anything" in the Act "extend" to a highway? What is aimed at is a provision producing a property effect upon a highway: there is no concern with an enumeration for descriptive purposes of kinds of work on lands generally to which the statute annexes certain legal consequences; the described works remain "mentioned" notwithstanding and unaffected by s. 2. Nor does either "highway" or "improvement" include a contract for work on a highway or moneys payable under it. The only statutory effect of

1959

CDN. BANK OF COMMERCE v. MCAVITY & SONS LTD.

Rand J.

the Act that, in the proper sense, could extend to the "highway", as a physical object, is the lien: mere description is quite beyond its purpose.

Section 3 deals with the "contractor" in a new aspect; it creates the equivalent of a lien on the moneys and it assumes a contract for a work mentioned in s. 5. The two securities, that is, the land and the money, are completely independent of one another; and to accede to the argument would be to hold that the legislature has added to a lien on land a beneficial interest in the contract money, but that, where no lien can arise, no beneficial interest is created in the moneys. We would have to find the clearest language to bring about such an inequitable result.

The lien on the land charges the interest of the owner but only to the extent of the moneys due by him to the contractor. Apart from the percentage of price required to be retained, it might happen that the price has been paid in full and the lien brought to an end, leaving the workmen and the material men nothing but the credit of the contractor on which to rely. It was to fill this hiatus that the contract moneys became charged, bringing about a security not only by way of lien to the amount of the remaining obligation of the owner, but by way also of a trust of the moneys received by the contractor or subcontractor, thus carrying the security of the price for the work down to the point of reaching those doing work or supplying materials. It would defeat that fundamental object of the statute to deny this trust to workmen on a work in a highway and leave them without any security whatever, while giving additional security to those already entitled to a lien. I find no language in the statute that can be read as intending that result.

Section 3 was originally enacted by c. 12, s. 30 of the Statutes of 1901 in substantially the same language as the present s. 2, but as a proviso to s. 7 of c. 153, R.S.O. 1897. Section 7 declared the estate or interest to which the lien created by the then s. 4, now s. 5, would attach. In 1910 the Act was revised and re-enacted as c. 69 and the proviso became s. 3. By c. 34, s. 21 of the *Statute Law Amendment Act, 1942,* s. 2a creating a trust in the contract moneys was added to the Act. In the revision of 1950 s. 3 and s. 2a became ss. 2 and 3 respectively. Under the original proviso

there is no doubt that the object of the exception was exclusively to provide that the lien would not attach to a highway: and the revision in 1910 by making it an independent section, while improving the statutory draftsmanship, did not modify that intendment. That must have been the assumption in 1942 when a vital extension of security designed for the benefit of workmen and material men was enacted; that was a time when highway construction had reached huge proportions among civil works undertakings in the province in which municipalities would participate extensively. The denial of its benefits to such works, in the presence of the language which has been analysed, would be a major frustration of a most important legislative purpose.

I would, therefore, dismiss the appeal with costs.

LOCKE J.:—The agreed statement of facts upon which this matter was heard states that the respondent supplied materials to Spartan Contracting Company, Limited, for the installation of fire hydrants and related equipment at Beverley Hills Subdivision, Richmond Hill, Ontario: that the Spartan Company had entered into a contract with the owners of the subdivision to construct sewers, water mains and appurtenances in the subdivision and that the materials supplied were used in respect to works on public streets and highways within the subdivision. In these circumstances, the Spartan Company as contractor and the respondent as the supplier of material would have been entitled to a lien upon the lands upon which the material was placed, were it not for the provisions of s. 2 of *The Mechanics' Lien Act,* R.S.O. 1950, c. 227.

Section 2 reads:

> Nothing in this Act shall extend to any public street or highway or to any work or improvement done or caused to be done by a municipal corporation therein.

Admittedly, this section which was introduced into *The Mechanics' Lien Act* of Ontario in 1901 is to be construed as declaring that no lien may attach to such a street and highway under the provisions of s. 5 of the Act. The appellant, however, contends that it is also effective to render s. 3 inapplicable to moneys received by a builder or contractor for work done on such a street or highway.

1959

CDN. BANK OF COMMERCE v. McAVITY & SONS LTD.

Locke J.

The language of s. 2 is lacking in clarity. Section 3 does not by its terms deal with public streets or highways but with moneys received by a builder or contractor on account of the contract price of work done or material supplied and, as the section reads, such moneys may be payable for work done for any of the purposes described in general terms by s. 5. That language is sufficiently wide to cover work done upon a street or highway. To declare that moneys so received are to be held in trust does not appear to me, on the face of it, to *extend* the section to a street or highway, even though the moneys in the particular case are payable in respect of work done upon them. The appellant's contention seeks to construe the section as if it read that nothing in the Act should extend to any public street or highway or to any money paid or payable in respect of work on them.

It is permissible, in view of the ambiguity in the language of s. 2, to enquire into the history of both sections.

Section 2, as originally enacted in 1901, affected only any claim to a mechanics' lien in respect of work done or material supplied for work on a street or highway itself. Section 3(1) was not added to *The Mechanics' Lien Act* until 1942. The amendment was, apparently, taken practically verbatim from an amendment to *The Builders' and Workmen's Act* of Manitoba made ten years earlier: c. 2, S.M. 1932. In Manitoba, the section continues as part of *The Builders' and Workmen's Act* and is now s. 3 of c. 28, R.S.M. 1954. As in Manitoba claims against such a trust fund are made under a separate statute, no question can arise as to the right being dependent upon the existence of a mechanics' lien under *The Mechanics' Lien Act* of that province.

It is by reason of the fact that in Ontario s. 3(1) was made part of *The Mechanics' Lien Act* that the question to be decided in this case arises.

In view of the decision of this Court in *Minneapolis Honeywell Regulators Co. v. Empire Brass Co.*[1], it can no longer be maintained that the right of a supplyman under s. 3 is conditional upon the existence of an enforceable lien under *The Mechanics' Lien Act.*

[1] [1955] S.C.R. 694, 3 D.L.R. 561.

In British Columbia s. 19 of *The Mechanics' Lien Act* was added by s. 2 of c. 48 of the Statutes of 1948. Its terms, with some slight changes which do not affect any question to be considered here, are identical with s. 3 of the Ontario Act and s. 3 of *The Builders' and Workmen's Act* of Manitoba.

The report of the trial of that case[1] before Davey J. (as he then was) is to be found in[1]. While the language of s. 2 of the Ontario *Mechanics' Lien Act* appears as s. 3 in the British Columbia Act, that section did not touch the matters to be decided. However, some of the arguments advanced in favour of the present appellant were considered in dealing with the case in the Courts of British Columbia and in this Court.

The Minneapolis Honeywell Company, as supplyman, had furnished material to a contractor engaged in building certain public schools in Vancouver. The company, while entitled to a mechanics' lien, had not filed such a lien but brought an action, after the time for filing had expired, against the contractor and against the Empire Brass Manufacturing Co. Ltd. (which had obtained an assignment of moneys payable by the owner from the contractor) claiming that the moneys which had been paid to the latter company were affected with a trust under s. 19. It was contended before Davey J. that the right to assert a claim under s. 19 was dependent upon the existence of a valid mechanics' lien at the time the action was commenced. I refer to the judgment of Davey J. on this aspect of the matter at pp. 220 and 221, that learned judge rejecting the argument. On appeal, however, the majority of the Court upheld the contention, holding that, as the time for filing a lien against the land had expired at the time the writ was issued, the claim under s. 19 could not be maintained. O'Halloran J. A. dealt with this aspect of the matter at length[2]. Sidney Smith J. A. agreed with this interpretation of the section. Robertson J. A. dissented, agreeing with Davey J.

The word "contractor" is defined by s. 2 of *The Mechanics' Lien Act* of British Columbia to mean:

> a person contracting with or employed directly by the owner or his agent for the doing of work or service, or placing or furnishing material for any of the purposes mentioned in this Act.

[1] (1954), 11 W.W.R. (N.S.) 212, 1 D.L.R. 678.
[2] (1954), 13 W.W.R. 449, 453-7, 4 D.L.R. 800.

1959

CDN. BANK OF COMMERCE v. MCAVITY & SONS LTD.

Locke J.

This is identical with the definition in subs (*a*) of s. 1 of the Ontario Act. The definition of "sub-contractor" includes the language of the Ontario definition as meaning:

> a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by the contractor, or under him by another sub-contractor

with an addition which does not affect the present matter.

O'Halloran J.A. considered further that the Minneapolis Honyewell Company was neither a contractor or a sub-contractor within the meaning of s. 19 of the British Columbia Act, and Sidney Smith J.A. agreed.

On the appeal to this Court, the respondent supported both of these findings. The unanimous judgment of this Court[1] held that the Minneapolis Honeywell Company was entitled to claim upon the fund.

The present appeal, in effect, raises both of these questions, though on different grounds.

It is said for the appellant that the Spartan Company was not a contractor "for any of the purposes mentioned in this Act" since the purposes referred to in the definition are those described in s. 5, that that section is to be read as if it, in terms, excluded services rendered or materials placed upon a public street or highway and that, accordingly, a person contracting to do work on such a street or highway is not a contractor within the definition. Stated otherwise, the point is that since no lien could arise in consequence of the work, the Spartan Company was not a contractor, as so defined. It would, presumably, follow that the Spartan Company was not a contractor within the meaning of that term in s. 3. The Spartan Company was clearly not a sub-contractor. Accordingly, since it fell within neither definition, any claim of the material man under s. 3 could not be sustained.

The opinion of the majority of the learned judges of the Court of Appeal for British Columbia, that no claim could be made under s. 19 of the Act of that province, rested on the ground that, considering the Act as a whole, it should be construed as meaning that the existence of a valid claim to a lien upon the property was essential to such a claim. Here it is said that, since no lien could ever

[1] [1955] S.C.R. 694, 3 D.L.R. 561.

arise upon a public street or highway, work done or materials placed upon such property was not done or placed "for any of the purposes mentioned in this Act."

In my opinion, the contention should be rejected. The work contracted for by the Spartan Company with the owner of the subdivision fell within the general description of works mentioned in s. 5, and the fact that its performance did not give rise to a right of lien upon the property I consider to be immaterial in deciding whether that company was a contractor as defined. In determining whether the Spartan Company was a contractor within s. 3, the circumstance that no right of lien arose is of no more consequence than was the fact that the right of lien had been lost in the *Minneapolis Honeywell* case when the proceedings were instituted.

The right given to a material man to resort to the moneys paid to the contractor under s. 3 is quite distinct from the right to a lien given by s. 5. In my opinion, when the Legislature of Ontario adopted the language of the section of *The Builders' and Workmen's Act* of Manitoba, it was intended that the additional right so given should be the same as if it were conferred, as was done in Manitoba, by a separate statute.

As to s. 2, when enacted in 1901 it was designed to prevent a lien, with a consequent right of sale, attaching upon a public street or highway for obvious reasons. No such reason could exist in the case of the new and distinct right given to material men and others in 1942. The language of s. 2 was not designed to affect such a right and does not, in my opinnion, include it.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Blake, Cassels & Graydon, Toronto.

Solicitors for the plaintiff, respondent: Downey, Shand & Robertson, Toronto.