Supreme Court of Canada
Calgary (City) v. Dominion Radiator Co., (1917) 56 S.C.R. 141
Date: 1917-11-28

The City of Calgary (Defendant) Appellant;

and

The Dominion Radiator Company (Plaintiff) Respondent

1917: October 18; 1917: November 28.

Present:—Sir Charles Fitzpatrick C.J. and Davies, Idington Duff and Anglin JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Mechanic's lien—Notice in writing—Verbal notice—Registration—"Alberta Mechanics' Lien Act," s. 32, as amended in 1908.

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Held, Fitzpatrick C.J. and Idington J. dissenting, that, to enforce the mechanics' or the material man's lien, under the "Alberta Mechanics' Lien Act," a "notice in writing of such lien and of the amount thereof" must be given to "the owner or person having superintendence of the work on behalf of the owner," according to section 32 of the Act, as amended in 1908.

Per Fitzpatrick C.J. dissenting.—Such notice in writing is not intended to affect the validity of the lien, but merely to determine the extent of the owner's liability.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta[1], reversing the judgment of Harvey C.J. at the trial, and maintaining the plaintiff's action.

The respondent's action was brought against the appellant to enforce a lien under the "Mechanics' Lien Act" of Alberta, recorded against property owned by the appellant on which a building known as the "Children's Shelter" had been constructed. The respondent had supplied for this building the steam boiler and radiators necessary for a heating system and a pumping equipment.

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The principal issue submitted by the appellant is that respondent's claim was barred by failure to give written notice as required by section 32 (as amended in 1908), of the "Mechanics' Lien Act" of Alberta. The respondent contends that section 32 is merely a provision made to protect an innocent owner from having to pay money a second time; that the lien given by sec. 4 of the Act has its commencement as soon as the material is furnished, and that, when fyled, such lien is an encumbrance upon the land.

The trial judge held against the respondent, and dismissed the action; but, on appeal, the Supreme Court of Alberta unanimously reversed this decision.

F. E. Meredith K.C. and C. F. Adams for the appellant.
R. S. Robertson for the respondent.

[1] 11 Alta. L.R. 532 *sub nom. Dominion Radiator Co.* v. *Payne.*

THE CHIEF JUSTICE (dissenting)**.—**Under the terms of the "Mechanics' Lien Act," as I read it, the material men and labourers acquire, from the moment that the material is furnished or the labour performed (section 4), an interest in the contract price limited to the sum actually owing to the person entitled to the lien (section 8), which interest cannot be for any greater sum than the owner has agreed to pay by his contract (section 19). The lien to secure that interest becomes effective upon registration under section 2 *(g)* and *(k)* and section 41 of the "Land Titles Act."

But the appellants contend: 1st, that the claim of lien was filed too late: and 2nd, that the claim was barred by reason of the failure to give written notice. Section 32, as amended.

Dealing with the first point. I find that section 13 of the Act, fixing the time within which the material

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man's lien must be filed, provides that the lien shall cease to exist on the expiration of 35 days after the claimant has ceased from any cause to place or furnish the material. In other words, the date from which the delay runs is not that from which the purchase price becomes due and exigible but from the date at which the material man has ceased to place or furnish the material, and that, of course, depends on the facts of each case.

There can be no dispute about the facts here. When the city authorities gave the order to supply the heating system for the Children's Shelter in July, 1914, they had then in contemplation the installation of a pumping system to supply the water without which the heating system could not be operated. A well was then dug, and the subject of a pumping system was discussed with the company before they supplied the radiator for the heating. As a matter of fact, the pump was actually ordered about the 14th of November (1914), at which date the radiator and boiler were being installed. The one system was necessarily complementary of the other: the heating system could not be operated without the pumping system. As one witness observes, it is difficult to use radiators and boilers without water.

Although the material required was ordered at different times, the parties had in contemplation from the outset the purchase and supply of a complete set of pumps, boilers and radiators to heat the building by hot water. This explains why a price for the pump was obtained from the respondent at the outset. It is difficult to read the evidence without

coming to the conclusion that, as found below, there was what Chancellor Boyd calls in *Morris* v. *Tharle*[2]:

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> one entire prevenient governing contract of which the respective deliveries are merely the execution.

Once that conclusion was reached by the Appellate Division, then, I think, there can be no doubt that, as found, the claim was filed within the delay *(en temps utile).* The pump was delivered in December, 1914 but when tested it was found to be defective; and in February the shaft and wheel were returned to the manufacturer. In a letter written in February, 1915, by the contractor, he says:

> It (the pump) was running about five minutes, when the pinion became jammed and when they stopped the machine it was all chewed up the way it was mailed to you.

It was not until March, 1915, that a complete pump was furnished and the lien was filed on April 1st, 1915, well within the statutory delay. Idington J. in the case of *Day* v. *The Crown Grain Co.*[3], says:

> The test question here is whether or not the appellant could in law have sued on the 20th April and recovered from Cleveland as for a complete contract. I am of opinion he could not. Trifling as the parts unfinished were, the party paying, in such a case, was entitled to insist on the utmost fulfilment of the contract and to have these parts so supplied that the machine would do its work.

Now, dealing with the second objection to the effect that the claim is barred by reason of failure on the part of the material man to give notice in writing. By supplying the material, an interest or lien on the money in the hands of the owner is acquired by the furnisher, and by registration that lien becomes, under the "Land Titles Act," an incumbrance on the owner's title to the land so that under the provisions of the two statutes the furnisher of material acquires, by registration in the Land Titles: Office, an incumbrance on the owner's land for the price of his material.

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Anglin J. said in *Travis* v. *Brakenbridge* (unreported) :

> Registration may be deemed notice to the owner.

In this case the material man not only registered his claim but also gave actual notice to the owners through Sylvester, their representative on the work, that he looked directly to the fund for the payment of his claim. There is nothing in the statute that requires him to do

[2] 24 O.R. 159, at p. 164.

more than to register his lien to acquire this incumbrance; and, as Mr. Robertson argued here, there is nothing in the statute which states that the interest in the fund so secured by an incumbrance on the land ceases to exist or that the incumbrance on the land is discharged, if a notice in writing is not given under section 32. That section, as it formerly stood, read as follows:

> No lien * * * shall attach so as to make the owner liable for a greater sum than the sum owing and payable by the owner to the contractor

As amended it now reads:

> No lien * * * shall attach so as to make the owner liable for a greater sum than the sum owing; by the owner to the contractor at the time of the receipt by the owner or person having the superintendence of the work on behalf of the owner of notice in writing of such lien and of the amount thereof or which may become owing by the owner to the contractor at any time subsequent thereto while such lien is in effect.

The section was amended in 1908 I strongly suspect because of the judgment of the Alberta appeal court in *Travis* v. *Brackenbridge,* which condemned the owner to pay twice over.

Those amendments, especially in view of the conditions in the various sub-sections were intended not to effect the lien but to determine the amount for which the owner would be liable. His liability is limited to the amount due at the moment the notice

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was served; taken literally, that is all the language means. The Act does not say when the notice should be served to be effective. It does not in terms make the validity of the lien depend upon the service of a notice in writing upon the owner, nor does it say that failure to give notice discharges the encumbrance on the land. The Act says merely (sec. 32):

> No lien * * * shall attach so as to make *the owner liable for a greater sum than the sum owing by the owner to the contractor*.

The notice is not intended to affect the validity of the lien, but merely to determine the extent of the owner's liability, and for his interest only.

Whatever may have been the purpose of the legislature in enacting the amendments to clause 32 as it originally stood, it seems to me obvious that the notice in writing was not intended to protect the contractor or his assignee. The construction contended for by the bank would, in the circumstances of this case, give to a general contractor a preference over the material man who had a lien under the statute for the price of his material, and of

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[3] 39 Can. S.C.R. 258, at p. 263.

which lien the owner had particular notice, as is evidenced from the terms in which the receipt taken from the bank is drawn.

The appeal should be dismissed with costs.

DAVIES J.—I concur in the opinion stated by Mr Justice Anglin.

IDINGTON J. (dissenting)**:—**This is an appeal from a judgment maintaining a claim of respondent to enforce a lien for material, under the "Alberta Mechanics' Lien Act."

The only serious difficulty I find in the case turns upon the question of whether or not a transaction between appellant and the Bank of British North America (which, as assignee of the contractors with

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the city, admittedly stands in the same position as the contractor), represented by an instrument which reads as follows,

EXHIBIT 13.

> The Bank of British North America hereby acknowledges to have received from the City of Calgary $1,457.98, the balance due as certified by the city engineer on the contract between Grant Brothers, Limited, and the city for plumbing, heating and water supply in connection with the Children's Shelter; and the bank hereby undertakes and agrees with the City of Calgary that if any claim shall be made and established against the city under the "Mechanics' Lien Act" under said contract not exceeding the said sum of $1,457.98, the same shall be paid by the said bank, and if any action is brought against the city to establish any such lien the bank will either pay the amount claimed, or, at its own costs and charges, contest said claim and indemnify the city against the same and any costs occasioned thereby not exceeding the amount hereinbefore mentioned—the city on receipt of said claim, or on being served with any proceedings in Court, to notify the bank thereof.
>
> Dated the fifth day of May, A.D. 1915,

is clear evidence of payment absolving appellant from all liability under the Act.

There is no evidence, unless it be the admitted fact that the said sum of money was paid to the bank, of how or why the appellant should be held to have so paid, in face of the clearest evidence that both the appellant and the bank knew, at the time of said payment that the respondent had duly registered the lien, under the Act, now sought to be enforced.

There were two fairly arguable points of law which may have been present to the minds of those concerned relative to the right of the respondent to maintain the lien so registered as to any part, or at all events as to the larger item, of the claim.

It has been stoutly contended throughout, first, that the lien was registered too late to be effective, and secondly, in any event, that the first item of the account had been delivered and for a short time in use, two months or so before registration of the lien.

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I agree for the reasons assigned in the judgment of Mr. Justice Beck in the court below, that the account was, under the circumstances in question, of that continuous nature and in relation to the same work as to render the lien under section 4 of the Act valid if registered within thirty-five days from the completion of the entire work and that by reason of the inefficiency of the machine which constituted the second item thereby needing a substitution of one of its parts, that the time for registration only began to run from a date clearly within thirty-five days preceding registration.

Were these the only questions which confronted the appellant and the bank and were present to the minds of those concerned in framing the above mentioned instrument? If so, then there is an end of the appeal.

But in the absence of any evidence, we are left to conjecture or to draw such inferences as we may relative to the intention and meaning of the transaction.

However that may be, it is now claimed that under section 32 which reads thus:

> Sec. 32:—No lien, except for not more than six weeks' wages in favour of labourers, shall attach so as to make the owner liable for a greater sum than the sum owing by the owner or the contractor at the time of the receipt by the owner or person having superintendence of the work on behalf of the owner, of notice in writing of such lien and of the amount thereof; or which may become owing by the owner to the contractor at any time subsequent thereto while such lien is in effect,

inasmuch as there was no written notice to the appellant, the lien never attached.

That has been answered by holding the statement of claim was a written notice and so it would be literally within the language of the Act.

That is answered again by saying that no lien attaches so as to

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> make the owner liable for a greater sum than the sum owing by the owner or the contractor at the time of the receipt by the owner or person having superintendence of the work * * * of notice in writing of the lien, etc.

What does this mean? Clearly the contractor owed, and still owes, the entire sum. And just as clearly under the statute, a lien did attach unless we are to hold that in the

case of a contractor paid in advance by the owner, no lien is intended by the statute to attach under section 4 by virtue of the respondent's furnishing the material.

It is not the registration that makes it attach. That is only a requirement for its continuation beyond thirty-five days after completion.

It may be said this is hypercritical, and that the intention of the statute must be looked to in order to make it workable. I incline to agree therewith, but I submit that those relying upon such a doubtfully worded instrument as that now in question ought, in the same spirit, to have made plain what they intended.

It can, in every word of it, be made operative by referring the questions of what it, negatively as it were, provided should nullify the operation of the lien, to the obvious questions I have referred to, as all the document had in contemplation under the circumstances.

To insist upon more renders it necessary to impute to the appellant, having full knowledge of the fact that the lien existed, the most unworthy motive of resorting to a trick for the purpose of unjustly depriving respondent of its money.

For my part, I will not put that construction (which will wear the appearance of an intent akin to fraud) upon the document, and short of that, in my view, the appeal fails.

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It comes to this that despite all the growing tendency of public corporations, like the appellant, to promote honesty and fair dealing with those serving the city, as we had illustrated in the contract we had before us in the recent case of *Union Bank of Canada* v. *Ritchie Contracting & Supply* Co., which specifically provided (and we upheld its doing so) that such claims must be paid, there is room to argue that material men may be beaten out of their rights under the "Mechanics' Lien Act" if the contractor can induce such corporation to aid them.

Leaving aside the broad question of whether or not it is possible to so contract that the lien may be prevented by an agreement providing for advance payments to the contractor, suppose we found such an attempt to take the form of this document being incorporated into and made part of the agreement for any public work, how should a court look at it?

Suppose a bank at the back of a contractor in such a case at the very outset willing to indemnify upon receiving the money, would such a transaction fall within the meaning of section 32 and be held payment?

This question I put to counsel and am yet without an answer.

I cannot assent to such a repeal of the Act.

I agree with Mr. Justice Walsh that such a transaction of suspensive holding of money, as evidenced by this receipt, is not a payment within the meaning of the Act.

I think the appeal should be dismissed with costs.

DUFF J.—The appeal should be allowed, and the action dismissed with costs.

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ANGLIN J.—Reversing the judgment of Harvey C J., who had dismissed the action, the Appellate Division of the Supreme Court of Alberta held the plaintiffs, the Dominion Radiator Co., entitled to a mechanics' lien in respect of the price of a hot water heating system ($1,019.27) and a water pumping system ($438.71) furnished by them as sub-contractors for Grant Bros. Limited to the defendants, the City of Calgary, for a children's shelter. From that judgment the city appeals on three distinct grounds:—

(*a*). That the lien in respect of the whole claim had expired before it was registered;

(*b*). That the contract for the heating system was entirely distinct and separate from that for the water system and that the lien in respect of the former, at all events, had expired;

(*c*). That when the city first received a "notice in writing" of the plaintiffs' lien no sum was owing by it to the contractors.

In view of my opinion on the third ground of appeal, I have found it unnecessary to pass upon the other two grounds.

Sec. 32, s.s. 1, of the "Alberta Mechanics' Lien Act" is as follows:—

> Sec. 32.—No lien, except for not more than six weeks' wages in favour of labourers, shall attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor (at the time of the receipt by the owner or person having superintendence of the work on behalf of the owner, of notice in writing of such Hen and of the amount thereof; or which may become owing by the owner to the contractor at any time subsequent thereto while such Hen is in effect).

The words in brackets were added by an amendment of 1908.

The lien is created by section 4 of the Act, and is thereby declared to be

limited in amount as hereinafter mentioned.

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By section 8, it is

limited in amount to the sum actually owing to the person entitled to the lien.

By section 19 it is provided that

the owner complying with the provisions of the Act shall not be liable for any greater sum than he had agreed to pay by contract.

By section 32, above quoted, a further limitation is imposed, with the result that the lien attaches only to the extent of any moneys owing to the contractor by the owner when the latter receives notice in writing of the lien, or which may subsequently become owing to the contractor.

Admittedly the first notice in writing of the appellant's lien received by the city was the statement of claim in this action delivered on the fourth of November, 1915. At that time the city had in hand no moneys owing to the contractor, Grant Bros. Limited. It had paid the last of such moneys in its hands ($1,457.98), to the Bank of British North America on the 19th of May, 1915, upon a claim made by the bank under an assignment from Grant Bros., of which it had received formal notice on the 25th Feb., 1915. The appellants' lien was registered on the first of April, 1915, and there is evidence of verbal notice of their claim having been given to the city's building superintendent shortly before its registration and again shortly afterwards. On making the payment to the bank the city took from it the following receipt:

> The Bank of British North America hereby acknowledges to have received from the City of Calgary $1,457.98, the balance due as certified by the city engineer on the contract between Grant Bros. Limited and the city for plumbing, heating and water supply in connection with the Children's Shelter; and the bank hereby undertakes and agrees with the City of Calgary that if any claim shall be made and established against the city under the "Mechanics' Lien Act" under said contract not exceeding the sum of $1,457.98, the same shall be paid by the said

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> bank, and if any action is brought against the city to establish any such lien the bank will either pay the amount claimed, or, at its own costs and charges, contest said claim and indemnify the city against the same and any costs occasioned thereby not exceeding the amount hereinbefore mentioned—the city, on receipt of said claim, or on being served with any proceedings in court, to notify the bank thereof.

Dated the fifth day of May, A.D. 1915.

Upon the foregoing facts, the respondent urges that the payment by the city to the bank after registration and verbal notice of the lien was a fraudulent attempt to defeat it, and should therefore be held void as against the lien holder, and that the terms of the receipt taken by the city confirm this view and also shew that the payment to the bank was not intended to be a genuine and absolute payment, and should therefore be disregarded in considering whether there was any sum owing by the city to the contractors when it received notice in writing of the lien—that it was in fact merely a conditional payment of money to be returned to the extent to which the city might be held liable to meet the plaintiffs' lien.

There is no evidence of any collusion or of fraudulent intent on the part of either the city or the bank. No indirect or improper motive has been suggested for the city or its officials preferring the bank's claim under its assignment to that of the plaintiffs. For aught that appears the civic authorities may have acted in the *bond fide* belief that the plaintiffs' lien had expired before its registration, and that the city was bound to make payment under the assignment of which it had received notice on the 25th of February. Fraud is not to be presumed in this case more than in any other.

The effect of section 32 as it now stands, is, in my opinion, to make the giving of notice in writing to the owner a condition of the mechanic's or the mat-

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erial man's lien attaching so as to make the owner liable, just as other sections of the Act make registration and the institution of an action within defined periods conditions of its preservation. There can be no more justification for holding verbal notice to be a sufficient ground for dispensing with the fulfilment of one condition than for treating it as a valid excuse for non-compliance with the others. To hold that the extent of the owner's liability is fixed either by actual verbal notice or by registration would be contrary to the explicit terms of section 32 and would involve either reading out of that section the words "in writing" or inserting a declaration that registration shall be deemed "notice in writing." Such an alteration of the statute the legislature alone is competent to make.

There is nothing inherently unfair or extraordinary in a provision imposing the giving of notice in writing to the owner as a condition of the existence of such a special privilege as the right to a lien conferred on vendors of labour and material for work upon lands. It may be that in endeavouring to protect the owner from the difficulties of a situation that

might arise from the absence of some such provision (illustrated in the cases of *Breckenridge & Lund* v. *Short*[4] and *Travis* v. *The Breckenridge-Lund Company* [5] the legislature went farther in 1908 than was necessary or desirable. But, if so, the responsibility is with it and the remedy in its hands.

Much was made in argument for the respondent of the provision of the "Land Titles Act" which declares a mechanics' lien when registered to be an encumbrance on the lands. But the existence of the

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lien itself and its extent depend upon the provisions of the "Mechanic's Lien Act." The two statutes must be read together, and registration under the "Land Titles Act" cannot be taken to create an encumbrance where there is no valid lien under the "Mechanics' Lien Act" or to neutralize or modify the limitation upon its extent which the "Mechanics' Lien Act" explicitly imposes.

As to the receipt taken by the city it does not establish that the payment to the bank was conditional. It merely shews that, having some knowledge of a claim of lien which they may have deemed quite unfounded, the civic officials, *ex majori cautela,* sought and obtained from the bank an indemnity against the possibility of that claim turning out to be enforceable. Failure to have done so in reliance upon their own belief, however firm, that no lien in fact existed, or that the assignment to the bank, operating from the date when the city had notice of it, gave its claim priority over that of the plaintiffs, of which it received verbal notice only subsequently, might have been deemed culpable remissness by those to whom the officials were accountable. However mistaken that belief may have been, after the city had paid over to the bank all the moneys in its hands owing to the contractor, there was, in my opinion, no "sum owing by the owner to the contractor" within the meaning of section 32.

With great respect for the learned judges who take the contrary view, I am of the opinion that the judgment *a quo* involves a repeal of the amendment of 1908 to section 32 which the legislature alone can effect. On this branch of the case I agree with the learned Chief Justice of Alberta, whose judgment,

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[4] 2 Alta. L.R. 71.
[5] 43 Can, S.C.R. 59.

I think, should be restored. The appellant should have its costs here and in the Appellate Division.

Appeal allowed with costs.