EARL F. WAKEFIELD COMPANY (*Plaintiff*) ..... APPELLANT;

1958

*Feb. 5, 6
Apr. 22

AND

OIL CITY PETROLEUMS (LEDUC) LTD., PONOKA-CALMAR OILS LTD., AMERICAN LEDUC PETROLEUMS LIMITED, HARRY SZPILAK, KASPER HALWA, ALVIN M. DAVIS, PETER MATVICHUK, ALVIN M. BERG, JACOB B. GAUFF AND ALEX JOHN PYRCH (*Defendants*) .....RESPONDENTS.

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

Mechanics' liens—Arising of lien—Drilling of oil well—Proceedings to enforce lien—Appointment of receiver—Charge on moneys in receiver's hands—Effect of failure to file renewal statement—The Mechanics' Lien Act, R.S.A. 1955, c. 197, ss. 2(g), 29(7), 49-55.

*PRESENT: Kerwin C.J. and Rand, Locke, Fauteux and Abbott JJ.

[1] (1904), 11 B.C.R. 91 at 96.

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The plaintiff company, under an arrangement made with it by H. and M., commenced drilling an oil well on September 10, 1949. On September 19, O. Co. was incorporated, with H. and M. as the sole shareholders beneficially interested, and the company made a formal contract with the plaintiff for the drilling to commence on or before September 15, 1949. On September 24, O. Co. entered into an agreement with other companies (including the assignee of the oil lease in the property) and H. and M., therein described as "agents", wherein it was recited that the latter "have assisted in arranging for the drilling of the said wells" and O. Co. covenanted to "commence to drill or cause to be commenced to be drilled" the well which had in fact been commenced by the plaintiff. Drilling had been suspended by the plaintiff on September 23 because of non-payment by O. Co.; mechanics' liens were registered by the plaintiff in October 1949, and an action was brought within the time prescribed.

About three months after the cessation of work, arrangements were made with others under which the well was completed and brought into production. In June 1950, a receiver was appointed to sell the oil won, and, subject to stated deductions, to deposit the proceeds in a special trust account to the credit of the action. The plaintiff's action did not come to trial until more than six years had elapsed from the registration of the lien, and no renewal statement had been filed as required by what is now s. 29(7) of *The Mechanics' Lien Act*.

Held: (1) In these circumstances, a valid lien in favour of the plaintiff arose in 1949 for the value of the work actually done. It was clear that there was a lien for the work done after the making of the contract with O. Co. on September 19, and the lien should also extend to the work done before that agreement was made since it must be held that the original agreement with the plaintiff was made with the privity and consent of the lessees and the companies concerned, and under their implied authority.

(2) While the lien on the land ceased to exist because of the failure to file the necessary renewal statement before the expiration of six years, the transferred lien or charge on the moneys in the hands of the receiver was not affected by this failure, and the plaintiff was accordingly entitled to recover the value of its work out of these moneys.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Divison[1], reversing a judgment of McLaurin C.J.T.D. Appeal allowed.

J. V. H. Milvain, Q.C., and *R. A. MacKimmie, Q.C.*, for the plaintiff, appellant.

M. E. Manning, Q.C., for the defendant Oil City Petroleums (Leduc) Limited, respondent.

W. G. Morrow, Q.C., for the defendants Ponoka-Calmar Oils Limited, and American Leduc Petroleums Limited, respondents.

[1] 22 W.W.R. 267, 10 D.L.R. (2d) 36.

The judgment of Kerwin C.J. and Rand and Abbott JJ. was delivered by

RAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta holding the appellant, to be called "the Company", not to be the holder of a lien under *The Mechanics' Lien Act,* R.S.A. 1942, c. 236, now R.S.A. 1955, c. 197, on money held by a receiver to the credit of the action and representing the proceeds of the sale by the receiver of oil from a well, the drilling of which was in part done by the Company. The work commenced on September 10, 1949, under circumstances which will be dealt with later, and on or about September 23, after reaching a depth of 2,570 feet, operations were suspended until payment of remuneration was made according to the terms of the agreement. On September 26 a cheque on account was issued to the Company but was dishonoured: no further work was done and on October 22, under permission of the Natural Gas Conservation Board, the well was plugged and abandoned by the Company. Claims of lien were on October 12 and 18 registered against "Legal Subdivision 7 of Section 21, in Township 49, Range 26, West of the 4th Meridian . . . containing 80 acres more or less", and appropriate proceedings in court were commenced within the time specified by the Act. Three months or so after the cessation of work arrangements were made with others under which the well was completed and brought into production.

In June 1950 a receiver was appointed to sell the oil won, and, subject to the payment of operating expenses and a certain royalty to the owner of the fee, to deposit the proceeds in a special trust account to the credit of the action. The well's production was exhausted prior to trial, but before judgment was pronounced six years had elapsed from the registration of the claim and no statement had been filed in the land titles office of the amount still owing as required by s. 24(6) of the Act, enacted by 1947, c. 64, s. 1 (now s. 29(7)). It was not suggested that the six years had expired before the production ceased.

The trial proceeded on an agreed statement of facts. The lien of the Company was declared valid for the sum of $30,000 which, for the purposes of the action, by para. 13 of the agreement as to facts was admitted by all parties

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to represent the fair value of the work done. At the hearing s. 24(6) was not raised; but on appeal the point was taken that by its effect the lien, including that on the money in the hands of the receiver, had ceased to exist. Porter J.A., speaking for the majority of the Court, held that no lien had arisen and the effect of s. 24(6) was not considered; but McBride J.A., with Johnson J.A. concurring, assuming a valid lien, based his opinion on that section which, operating before judgment, he viewed as nullifying the lien and the judgment based on it, including the same effect on the money in court. On this latter interpretation of the subsection, the appeal here must be dismissed, and the question of its soundness presents itself at the threshold of our consideration.

The end and object as well as the limitations of a mechanics' lien, a creation of statute, are, for the value of labour and materials, in the widest sense, applied to an improvement of land, to provide a security to those furnishing them in a legal charge upon the improvement and the land to which it has been added. Registration to bring that charge into harmony with the law affecting land titles is, for that reason, necessary and as a result s. 19 (now s. 23) provides for the making of a "claim for the registration of a lien" in the land titles office of the registration district in which the land is situated. The lien itself arises from the beginning of the work or the furnishing of materials and is an existing interest when registration is sought, upon which it becomes, by s. 19(8) (now s. 23 (10)), "an incumbrance against the land, or the estate or interest in the land therein described, as provided by *The Land Titles Act*".

A question was raised on the argument to which s. 19(8) is relevant: it was urged that the effect of s. 6 is to create a lien on the "land", *i.e.*, the land in its total interests or estates, in its fee simple. It was conceded that s. 10(1), which deals with the case of leased land, assumes the contrary, that what is bound is the estate or interest of the person or persons coming within the words of s. 6, "any owner", as the latter word is defined in s. 2(*g*). That what is suggested is not the true interpretation of s. 6 is confirmed not only by s. 10(1) and s. 19(8) but by the

forms of claim provided in the schedule to the Act. According to them the lien is to be claimed " upon the estate of" the owner in the land to be charged.

These considerations emphasize likewise the fact that the registration is essentially for the purpose of protecting the title to an interest in or against an estate in land; the lien becomes a legal encumbrance registered as such under the regime of land titles, and in that manner accommodated to the security of titles generally. That object becomes significant to the first issue.

The statutory scheme contemplates a sale of the owner's interest in the land with the improvement and the distribution of the proceeds among those whose liens at the time are then existing; but special situations are envisaged. By s. 26 (now s. 31) a judge may allow security for or payment into court of the amount of the claim and may thereupon vacate the registration by order. The effect of that is to bring to an end the lien on the land; the money paid into court takes the place of the property so discharged as if it had been realized by a sale under the Act. No reference is made in s. 26 to the effect of the discharge on the new "security" that may be given, but clearly that must be the same as in the case of money. By this provision the purpose of the registration is underlined: the act of vacating the registration is simply to clear the title. That done, the lien on the land ceases and a charge on personal property arises which is not a lien for which registration is required or possible.

This brings us to s. 24(6). The result of failure to comply with that section obviously cannot affect the new and non-registrable lien under s. 26; no land contemplated by s. 6 is affected by it and registration is impossible. Is there such effect on the new non-registrable lien created against the fund in court arising from the receivership?

The early exploitation of oil and gas resources in the Province raised questions of difficulty under the earlier provisions of the Act and special terms were enacted by the Legislature by 1943, c. 31, s. 12, in ss. 43 to 47 (now 49 to 55) inclusive. Section 43 expands the definition of "owner" to every person

having any estate, interest or right in the oil or gas in place or in the oil or gas when severed, notwithstanding that such person has not requested

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the contract work to be done, is only indirectly benefited thereby and has had no dealing or contractual relationship with the contractor or persons claiming the lien;

Provided, nevertheless, that where the oil or gas is held in fee simple, the holder of an interest in the first royalty in the oil or gas, up to twenty per cent thereof, shall not, by reason of this section, be deemed to be an owner.

Section 44 extends the lien to the oil and gas when severed. Section 45 declares all interests in the oil or gas under any lease, mortgage or agreement for sale relating to the oil or gas in excess of the first royalty up to 20 per cent. to be subject to the lien in all respects and excludes the application of ss. 10 and 11. Section 46 removes the necessity to set out in the claim for registration the name of the owner. Section 47 adds to the powers which may be conferred on a receiver appointed under s. 36 that of authorizing him either to operate the well or to take the oil and gas when produced, to sell it and pay into court the proceeds. These sections, because of the special character of the subject-matter, create additional and cumulative liens. Section 36 (now s. 42) provides generally for the appointment of a receiver to take charge of property bound by the lien and "rent" it—indicating the scope of the Act in its original form—and directs the net receipts to be applied "as directed by the judge". Finally, s. 37 (now s. 42) furnishes the order in which the distribution of "all moneys realized by proceedings under this Act" shall be made.

From a consideration of the foregoing provisions I am unable to agree that, in the case of an oil well, where the production has been converted into money and is held by a receiver in a manner equivalent to payment into court, the lien interests existing at the time of its receipt and deposit by the receiver are affected by the omission to file the statement required by s. 24(6). That requirement is in respect of "every registered lien" and that language must, I think, be restricted to the lien as it is an encumbrance on the land. The design of the subsection is clear, to bring an encumbrance on land to an end. It may have been made desirable, among other things, by either the protraction of lien actions against the land or neglect to remove the registration once the liens were satisfied. It is pertinent here to observe that the claim of lien can be

registered before the work begins. That the subsection was intended to extend to funds within the control of the Court is a view which has no support in any express language nor, in my opinon, in any warranted inference.

The argument assumes that these additional liens and charges, *i.e.*, on the oil itself after it has become severed and on its proceeds when paid into court, are conditioned upon the maintenance of the registration against the land. That that is a governing conception underlying the statute is refuted by s. 26. Whether subs. (2) of that section, which deals with money paid into court, is limited to payment under such an order may or may not be so. If it is, then there is nothing in the statute to cover the case of money in the hands of a receiver, as here, and the lien arises under the rules of the conversion of property implied by the statute; if not, the general considerations to be gathered from the Act apply. Section 26 in its use of the expression points the distinction between a "registered lien" and one not within the object of registration. The extent or scope of the lien on the severed oil is by no means clear. That purchasers in good faith and for value must ascertain the land from which oil comes and then search the title before they can safely purchase would present a most difficult situation; the confusion of the oil of many owners has become a commonplace; and that a succession of such purchasers would be bound by a legal encumbrance must surely be questionable. The lien undoubtedly exists while the oil remains in the possession of the owner where that possession is associated with the well or land from which it is produced: but there may be many oil areas and many collecting stations. For the extension of lien to the proceeds under the control of the Court, the purpose of registration is as completely irrelevant as in cases under s. 26. The liens being cumulative a defect in one is not to be attributed to another. Section 24(6) is given its full application here by holding the lien against the land and the oil in place to have come to an end but not the charge on the money in court. The existence of one is not the condition of the other and *vice versa*: no one would suggest that the loss of that on the oil severed would invalidate that on the land; they are several, independent and equal.

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It is not contended that the existence of the lien against the land or oil in place is not necessary to a lien arising on the oil severed or its proceeds: but that does not mean that it should at that moment be registered. Within 120 days from the completion of a well, which is the time for registering a lien on such an improvement, the entire production of the oil in place might be realized; and are we required to say that the lien attaching to the severed oil within that period would be destroyed by a failure to register? Whatever that may be, there cannot, in my opinion, be any doubt that on proceeds in court no such effect would follow.

There remains the question whether in the circumstances a lien ever arose. The facts are these. Some time prior to September 10, 1949, arrangements were made with the Company by two men, Harding and McMullen, which resulted in the commencement of drilling on or about that day. The work proceeded until September 23, when it was suspended as mentioned. On September 19 the respondent Oil City was incorporated with Harding and McMullen the only shareholders beneficially interested, and on the same day a formal contract for the drilling was entered into by that company with the appellant. The significant fact in the agreement is that it contemplates the work already to have begun:

> 3. The Contractor shall, subject to the provisions of clause two (2) hereof, commence drilling operations on or before the 15th day of September, A.D. 1949, and shall thereafter carry on the work hereby undertaken continuously . . .

Under date of September 24 (although in a notice by Ponoka-Calmar to Oil City of October 13, 1949, the date is stated to be that of September 21) an agreement was executed between the respondents American Leduc and Ponoka-Calmar, the assignees of the oil rights on legal subdivisions 1, 2, 7 and 8 of section 21, the respondent Oil City, Prudential Trust Company Limited and Harding and McMullen. By its terms the leases were assigned to the trust company; Oil City as operator, should the first well show commercial production, was, in certain contingencies, to drill one on each of the remaining subdivisions and such offsetting wells as were called for by the leases; for the cost of these American Leduc and Ponoka-Calmar were to furnish the trustee with $37,500 for each, the first to be

deducted by the trustee from their royalties of 30 per cent.; and finally, omitting terms immaterial here, the gross proceeds of production were to be paid to the trust company and by it applied as provided, which included the payment to Oil City of what remained after expenses and royalties, amounting to 72 per cent., were met. The preamble, among other things, recites an agreement between the first two parties to pool their rights in the four legal subdivisions, and it proceeds, "AND WHEREAS the Agents [meaning Harding and McMullen] have assisted in arranging for the drilling of the said wells". By para. 3:

> On or before the 20th day of September, A.D. 1949, the Operator [Oil City] shall at its sole expense commence to drill or cause to be commenced to be drilled one (1) well for the purpose of exploring, removing and producing petroleum and/or natural gas on Legal Subdivision Seven (7) of Section Twenty-one (21) . . .

The effect of the drilling agreement of September 19 was that Oil City adopted the work done up to that time as having been done under its provisions and no serious doubt can arise that as between the Company and Oil City, and as a result of the interest in the proceeds acquired by Oil City under the agreement of September 24, the lien covering the entire work then became effective: *Pittsburgh Steel Product Co. v. Huntington Masonic Temple Association*[1], in which, on the default of the first contractor, a second contractor was engaged by a surety to complete the work on the terms of the contract, and it was held that the lien of the second contractor covered the work from the beginning.

As to the respondents American Leduc and Ponoka-Calmar, they come clearly within s. 43 as being persons having an

> interest or right . . . in the oil or gas . . . when severed, notwithstanding that such person has not requested the contract work to be done, is only indirectly benefited thereby and has had no dealing or contractual relationship with the contractor or persons claiming the lien.

The drilling work prior to the date of the contract having been expressly contemplated in the agreement of September 24, these two companies *vis-à-vis* Oil City have ratified and bound themselves to the latter's recognition and inclusion of the work done previously to the 15th. Section 43 in its exceptional terms was undoubtedly passed to meet just such situations as are shown here, *i.e.*, conditions

[1] (1917), 81 W. Va. 222.

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brought about by the urgency to exploit the resource in which formal agreements could not keep pace with action and only by relation back were the rights of the parties intended to be determined.

The question remaining is the amount of the lien. The Company claims the sum of $50,000, the amount to be paid for the completion of the work; but that cannot represent the amount payable for part of it. It is admitted that the lien does not extend to damages for breach of contract and in the circumstances $30,000 becomes the amount due on a *quantum meruit*. Certain other sums were claimed as being within special provisions of the contract, but I agree with McLaurin C.J. that the latter are not in the circumstances applicable.

I would allow the appeal, set aside the judgment of the Appellate Division of the Supreme Court of Alberta and restore the judgment at trial, with the following modifications: by deleting therefrom the declaration that the appellant has a valid mechanics' lien against the mines and minerals within, upon or under the lands described; by adding thereto that the appellant recover against Oil City Petroleums (Leduc) Limited personal judgment in the sum of $51,670.62 with the costs of the action as awarded by the seventh paragraph of the judgment, together with costs of the appeal to the Appellate Division and to this Court; by amending the fourth paragraph thereof so as to declare and adjudge that the appellant is entitled to and has a charge on the funds held by the receiver to the extent of $30,000 principal sum, together with the total costs of the personal judgment; and by adding thereto that the appellant recover against the respondents Ponoka-Calmar Oils Ltd. and American Leduc Petroleums Limited personal judgment for the amount of costs in the Appellate Division and in this Court. As the question of costs was not argued, I would allow them to be spoken to.

The judgment of Kerwin C.J. and Locke and Fauteux JJ. was delivered by

LOCKE J.:—The judgment of the majority of the Appellate Division in this matter was delivered by Porter J.A. and decided that the evidence adduced did not disclose facts entitling the appellant to liens upon the moneys in the hands of the trustee, under the provisions of *The Mechanics'*

Lien Act, R.S.A. 1942, c. 263. The judgment of McBride and Johnson JJ.A., delivered by the former, held that if such liens did arise they had ceased to exist before the date of the trial of the action, by reason of the failure of the appellant to file a renewal statement as required by subs. (6) of s. 24 of the Act.

The action was tried by Chief Justice McLaurin at some date prior to November 2, 1955. The record does not disclose the nature of the evidence upon which the learned trial judge proceeded in deciding that the appellant was entitled to a lien, but it seems apparent that the parties had requested him to decide the matter upon oral admissions made before him and that these, or some of them, were incorporated in the agreed statement of facts which was filed on the above-mentioned date when judgment was delivered. The record shows that at the previous hearing, which had been adjourned, the Chief Justice had decided that the appellant was entitled to a lien and that the adjournment had been for the purpose of enabling the parties to put their admissions in writing and, if possible, agree among themselves on the amount for which the lien should be declared, reserving to the parties their right of appeal. On November 2, 1955, after the written admissions were filed, the learned Chief Justice said:

> I will accordingly find that the plaintiff has a valid lien and will give judgment in favor of the plaintiff for thirty thousand dollars, which sum shall be payable out of the receivership funds now held by the Toronto General Trusts Corporation.

The formal judgment was not entered until March 16 following. It declared that the appellant had a good, valid, binding and subsisting mechanics' lien in the sum of $30,000 against all mines and minerals within, upon or under legal subdivision 7 of section 21, hereinafter more particularly referred to, and further directed that the appellant recover the sum of $30,000

> from the funds held by the Toronto General Trusts Corporation, the receiver appointed herein pursuant to the Order of the Honourable Mr. Justice S. J. Shepherd dated the 22nd day of June, A.D. 1950.

The following sections of *The Mechanics' Lien Act* require consideration in dealing with the ground upon which the judgment of the majority has proceeded.

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Paragraph (*a*) of s. 2 defines the expression "contractor" as meaning

a person contracting with or employed directly by an owner or his agent, to do work or perform services upon or in respect of or to place or furnish materials to be used for, any improvement.

"Improvement" is defined by para. (*c*) as including a gas, oil or other well.

"Owner" is defined by para. (*g*) as follows:

"Owner" extends to every person, body corporate or politic (including a municipal corporation and a railway company), having any estate or interest in land, at whose request, express or implied, and,—

(i) upon whose credit; or

(ii) upon whose behalf; or

(iii) with whose privity and consent; or

(iv) for whose direct benefit,—

any contract work is done and all persons claiming under him or it whose rights are acquired after the commencement of the work.

This definition is extended by s. 43, enacted by 1943, c. 31, s. 12, which reads:

The definition of "owner" as set out in paragraph (*g*) of section 2 shall include, in addition to the persons therein set out, every person having any estate, interest or right in the oil or gas in place or in the oil or gas when severed, notwithstanding that such person has not requested the contract work to be done, is only indirectly benefited thereby and has had no dealing or contractual relationship with the contractor or person claiming the lien:

Provided, nevertheless, that where the oil or gas is held in fee simple, the holder of an interest in the first royalty in the oil or gas, up to twenty per cent thereof, shall not, by reason of this section, be deemed to be an owner.

Sections 6 and 7 of the Act read:

6. (1) [as re-enacted by 1943, c. 31, s. 1] Unless he signs an express agreement to the contrary and in that case, subject to the provisions of section 4, a person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructting, erecting, fitting, altering, improving, demolishing, or repairing of any improvement for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement 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 to be used.

(2) Materials shall be considered to be furnished to be used within the meaning of this Act when they are delivered either upon the land upon which they are to be used or upon some other land in the vicinity thereof, designated by the owner.

(3) The lien given by subsection (1) in respect of materials shall attach to the land as therein set out where the materials delivered to be used are incorporated into any improvement on the land, notwithstanding that the materials may not have been delivered in strict accordance with the provisions of subsection (2).

7 [as amended by 1943, c. 31, s. 2]. The lien shall arise at the date of the commencement of the work or at the date of the first delivery of material.

Section 44, enacted in 1943, reads:

The lien provided by section 6 shall not only attach to the land, including the oil and gas therein, but also to the oil and gas when severed.

The facts upon which the claim to the lien is based, in the order of their occurrence, are as follows:

By an agreement and lease dated May 31, 1948, Harry Szpilak leased to Herbert Lee Miller, John H. Duitman and three other named persons, all his right, title and interest in the petroleum, natural gas and related hydrocarbons in the north half of the south-east quarter of section 21, township 49, range 26, west of the 4th meridian in Alberta. This area includes legal subdivision 7. Among the numerous covenants of the lessees they agreed to drill a well for petroleum and natural gas upon these lands within two years from that date.

On September 10, 1949, at the request and on the instructions of George Harding and James McMullen, the appellant moved a drilling rig on to the lands and, between that date and September 23, 1949, drilled an oil well to a depth of 2,570 feet. Before commencing the work, the appellant was given a drilling permit issued by the Petroleum and Natural Gas Conservation Board of the Province of Alberta in the name of Oil City Petroleums (Leduc) Ltd.

On September 19, 1949, the appellant signed an agreement with Oil City Petroleums (Leduc) Ltd. to drill a well to a depth not exceeding 5,400 feet upon legal subdivision 7. While dated the 19th of the month, the written agreement required the appellant to commence drilling operations on or before the 15th of the month. It is common ground that the well referred to was that which had been commenced on September 10, above mentioned.

The Oil City company, in whose name the permit to drill the well had been granted on or prior to September 10, was not incorporated until September 19 and, at the time of the incorporation, its officers and only shareholders were the said Harding and McMullen.

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On September 21, 1949, Miller, Duitman *et al.* assigned their interest under the lease from Harry Spilak to the defendant Ponoka-Calmar Oils Ltd.

On September 23, 1949, the appellant informed the Oil City company that it would drill no further until payments were received for work already done, as provided for in the agreement of September 19.

On September 24, the respondents American Leduc Petroleums Limited and Ponoka-Calmar Oils Ltd. of the first part, the Oil City company of the second part, Prudential Trust Company Limited of the third part and George Harding and James McMullen of the fourth part, entered into an agreement providing that the Oil City company, designated as "the operator", should drill a well on legal subdivision 7 to a depth specified, for the consideration mentioned in the agreement. While the agreement does not say so, the well to be drilled was that which had already been commenced and continued under the above-mentioned circumstances. The agreement provided for the drilling of further wells and for the consideration to be paid to the operator. The recitals to this agreement referred to the lease granted by Harry Szpilak to Miller, Duitman *et al.*, above referred to, and a lease from one Mary Chubocha, both of which were held by Ponoka-Calmar Oils Ltd., and a lease from one Mike Szpilak to American Leduc Petroleums Limited of the oil and gas rights in legal subdivision 2 of section 21, and stated that the companies holding the said leases had agreed to pool their rights and to assign the leases to the trust company for the purposes of carrying out the agreement. A further recital referred to Harding and McMullen, who were designated as agents, and read:

> AND WHEREAS the Agents have assisted in arranging for the drilling of the said wells.

The function of the trust company was to receive the gross proceeds of any production from wells drilled on the same lands under the terms of the agreement and, after payment of royalties and rentals to the lessors and the expenses of the operator, to divide the balance in stated proportions between the parties.

On June 22, 1950, the order of Shepherd J. appointing the Prudential Trust Company Limited as receiver was

made. By an order dated September 10, 1953, the Toronto General Trusts Corporation was substituted to act in that capacity.

The question is as to whether there was evidence upon which McLaurin C.J.T.D. could properly find that the appellant had performed the work of drilling the well in respect of which the lien is claimed for or on behalf of "any owner, contractor or sub-contractor" within the meaning of s. 6, or of any "person having any estate, interest or right in the oil or gas in place or in the oil or gas when severed" within the meaning of s. 43, or with the privity and consent of any such owner.

No question arises, in my opinion, as to the work done after September 19, 1949, under the contract with the Oil City company, since the respondents Ponoka-Calmar Oils Ltd. and American Leduc Petroleums Limited by the agreement of September 24 expressly authorized the Oil City company to drill the wells or to have them drilled. The agreement, while dated September 24, specified the date for the commencement of drilling as a date four days prior to that and, while it does not refer in terms to the agreement of September 19, it appears to me an irresistible inference that these parties knew of and intended to approve the arrangement theretofore made by the Oil City company with the appellant as work done under the contract.

The Oil City company had not, however, been incorporated on September 10, when the appellant went on legal subdivision 7 and commenced drilling operations at the request of Harding and McMullen, and much the greater part of the work for which the claim for lien is, in my opinion, entitled to succeed was done prior to September 19.

While I think it may properly be inferred that at the hearing before McLaurin C.J.T.D. prior to November 2, 1955, he had been informed that Harding and McMullen in making the arrangement with the appellant had acted either on behalf of Miller, Duitman *et al.*, the lessees from Harry Szpilak, or upon instructions from Ponoka-Calmar Oils Ltd. under an arrangement between the individual lessees and that company, since the question as to whether the appellant was entitled to a lien was raised by the pleadings, the agreed statement of facts does not say so. The agreement of September 24, however, does recite the fact

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that Harding and McMullen had "assisted in arranging for the drilling of the said wells", a statement which, since only the one well had been started, clearly referred to what they had done in arranging with the appellant to commence drilling on September 10, since they were not parties to the agreement of September 19, and indicates that these two men had been authorized to make the arrangements at that time with the appellant and to request that the drilling be commenced. It is further to be noted that the agreement of September 24 was signed on behalf of Ponoka-Calmar Oils Ltd. by Duitman and Morrisroe, two of the lessees named in the lease from Harry Szpilak, and that a subsequent letter dated October 13, addressed in the name of that company to the Oil City company, complaining of default, was signed on its behalf by Duitman.

From these circumstances, it is proper, in my opinion, to draw the inference that Harding and McMullen had been authorized, either by the individual lessees from Harry Szpilak or on behalf of the Ponoka-Calmar company, to request the appellant to do the work, and, further, that the drilling done by the appellant from September 10 onward was done with the privity and consent of the said lessees and of the said company. Accordingly, in my opinion, a claim for a mechanics' lien came into existence on September 10, 1949, the work was continued under the agreement of September 19, and the appellant is entitled to enforce such lien, not only for the work done between September 10 and September 19, but thereafter under the agreement with the Oil City company. The individual lessees from Harry Szpilak and the Ponoka-Calmar company were owners within the meaning of that term in ss. 6 and 43 of *The Mechanics' Lien Act*.

I have had the advantage of reading the reasons for judgment to be delivered by my brother Rand dealing with the question arising under subs. (6) of s. 24 of the Act and I agree with his opinion on this aspect of the matter and that judgment should be entered for the appellant in the terms of the concluding paragraph of his judgment.

Appeal allowed.

Solicitors for the plaintiff, appellant: Chambers, Might, Saucier, Milvain, Jones & Black, Calgary.

Solicitors for the defendant Oil City Petroleums (Leduc) Ltd., respondent: Manning & Dimos, Edmonton.

Solicitors for the defendant Ponoka-Calmar Oils Ltd., respondent: Morrow, Morrow & Reynolds, Edmonton.

Solicitors for the defendant American Leduc Petroleums Limited, respondent: Milner, Steer, Dyde, Martland & Layton, Edmonton.