HENRI GADBOIS AND OTHERS (MIS-EN-CAUSE) ..... } APPELLANTS;

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*Feb. 26, 27.
*May 27.

AND

ARMAND BOILEAU AND ANOTHER ....(DEFENDANTS);

AND

STIMSON-REEB BUILDERS SUPPLY COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Privilege—Lien—Claim—Supplies of materials—When constituted—Houses built on different lots of land at the same time and by the same builder—Registration of single or separate privileges—Arts. 376, 2013, 2013e, 2167, 2168 C.C.—Bankruptcy Act, s. 24.

The appellants, Gadbois and Collé, were owners of nine lots bearing subdivision numbers 185 to 193, inclusive, of lot No. 37, in the parish of Montreal. They entered into a contract in writing with the builders, now defendants, Boileau and Cordeau, for the construction of nine duplex houses (one detached and the other eight semi-detached) on the above mentioned lots. The plan prepared by the architect shewed that each house should be wholly situate on one of the subdivision lots. The builders made arrangements with the respondent company for the purchase of materials to be used in the construction of these houses and obtained materials from it to the amount of $18,288.53. Before the builders had completed their contract, the appellants became bankrupt and trustees in bankruptcy were appointed; as a result, the builders were also compelled to make an assignment and a trustee was appointed. Before the completion of the last house, the respondent, to preserve the privilege given by law to a supplier of materials, registered against the above mentioned lands its account for all the materials supplied to the builders for the construction of the nine houses, showing a balance of $12,193.30 still unpaid; and within three months thereafter the respondent brought action against the builders personally and their trustee in bankruptcy and impleaded the appellants (mis-en-cause) as owners of the property burdened with the privilege and also their trustees in bankruptcy.

Held, reversing the judgment appealed from, that the respondent was not entitled to claim any privilege as supplier of materials. His notice of registration had not been given in conformity with the enactments of the civil code, if one considers the provisions which give to the supplier of materials a privilege on the immovable of the proprietor on whose lot or lots a building is erected (art. 2013e C.C.) in conjunction with the provisions of the law relating to the registration of titles to land according to the cadastral numbers of the lots into which it is subdivided (art. 2167-8 C.C.).

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

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Munn & Shea Limited v. *Hogue Limitée* ([1928] S.C.R. 398) discussed and distinguished.

The principle laid down in that case that a supplier of materials may register, under certain circumstances, a single privilege for the full amount of his claim against several lots as a whole, must be limited, in its application to the present case, to each pair of semi-detached houses, i.e., the respondent here, provided he registered a proper memorial, was entitled to a privilege on each pair of semi-detached houses for the unpaid price of its materials entering into the construction of each pair respectively; but it was not entitled to a single privilege on all the lots and houses for the balance of its claim for materials supplied which entered into the different buildings erected on the nine lots.

Held, also, that the respondent was not obliged to obtain leave of the bankruptcy court (s. 24 of the *Bankruptcy Act*) before taking its action against the appellants (owners of the lots), as the present proceedings so far as they relate to the enforcement of the privilege against the appellants' immovable are not proceedings "against the property or person of the debtor," the defendants being in this case the "debtors." The fact that judgment has been irregularly rendered against the "debtors" defendants without leave of the court does not constitute a defence by the appellants to the enforcement of the privilege.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Panneton J., and maintaining the respondent's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

T. Brosseau K.C. for the appellant.

E. Lafleur K.C. and *J. F. Chisholm* for the respondent.

The judgment of the court was delivered by

LAMONT J.—In January, 1927, the appellants, Henri Gadbois and H. L. Collé, were carrying on business together in Montreal under the firm name of Duplex Construction Company, and were owners of subdivisions 185 to 193, inclusive, of lot 37, according to the official plan and book of reference of the municipality of the parish of Montreal. On January 7, 1927, they entered into a contract in writing with Armand Boileau and J. B. Cordeau (hereinafter called the "builders"), for the construction of nine duplex houses (one detached and the other eight semi-detached) on the above mentioned land. Article 1 of the contract reads as follows:—

Article 1. L'entrepreneur fournira tous les matériaux et exécutera tous les ouvrages indiqués sur les dessins ou mentionnés dans les devis préparés par Cajetan Dufort (ci-après nommé l'architecte) pour la construction et finition de neuf duplex, lesquels dessins et devis sont identifiés par la signature des parties ci-contre et font partie de ce contrat.

The plan shewed that each house should be wholly situate on one of the subdivision lots and was to cost $16,000, except the detached house for which an additional sum was to be paid. The builders made arrangements with the respondent for the purchase of materials to be used in the construction of these houses, and, on February 9, 1927, the respondent notified the appellants, in accordance with Art. 2013 (*e*) of the Civil Code, as enacted by 7 Geo. V (1916), c. 52, and, in its amended form, as enacted by 14 Geo. V (1924), c. 73, that it had contracted with the builders to furnish materials " to the extent of $10,000 " for the construction of buildings on the lands above mentioned owned by them. This notice was received and accepted by the appellants. The builders proceeded to erect the houses and, after February 9, obtained materials from the respondent therefor to the amount of $18,258.53. Before the builders had completed their contract the appellants became bankrupt and J. E. Beaudin and N. Grobstein were appointed their trustees in bankruptcy. As a result of the bankruptcy of the appellants the builders were compelled to make an assignment in bankruptcy, and one Turcotte was appointed their trustee. As the houses were not finished when both the appellants and the builders became bankrupt, Beaudin and Grobstein, in their capacity as trustees, obtained from the respondent a further supply of materials, amounting to $887.55, to complete the buildings. On November 28, 1927, the respondent, to preserve the privilege given by the statute to a supplier of materials, registered against the above mentioned lands its account for material supplied to the builders, with the amounts paid thereon, which shewed a balance of $11,305.75 still unpaid. It also registered its account for $887.55 for material supplied to the trustees in bankruptcy. These registrations were made before the completion of the last house, and, within three months thereafter, the respondent brought action against the builders personally, and their trustee in bankruptcy, for $12,193.30, and impleaded the appellants (mis-en-cause) as owners of the property

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burdened with the privilege and also their trustees in bankruptcy. Neither the builders nor their trustee appeared to the action, but the appellants, as well as their trustees, contested the respondent's claim. The trial judge gave judgment in favour of the respondent, holding that it was entitled to a privilege as claimed, to the extent of $7,000. This judgment was affirmed by the Court of King's Bench, although two judges thereof were of opinion that the amount for which the respondent was entitled to a privilege was only $2,709.44. From the judgment of the Court of King's Bench the mis-en-cause appeal to this court.

Before dealing with the main grounds of appeal I will refer to certain objections to the procedure taken on behalf of the appellants. The first objection was, that, as both the appellants and the builders were in bankruptcy, the leave of the court should have been obtained before commencing proceedings and that in the absence of such leave all the proceedings were null and void. Section 24 of the *Bankruptcy Act* (formerly Art. 8 (B)) in part reads as follows:—

> 24. On the making of a receiving order or authorized assignment, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor or shall commence or continue any action, execution or other proceedings for the recovery of a debt provable in bankruptcy unless with the leave of the court and on such terms as the court may impose.

I am unable to find anything in this section to support the appellants' objection. Under the section it is only when proceedings are brought against the person or property of the debtor for a debt provable in bankruptcy, that the leave of the court must first be obtained. The present proceedings so far as they relate to the enforcement of the privilege against the appellants' immovable are not proceedings against the property or person of the debtor. In this case it is the builders who occupy the position of debtor. It is true that in these proceedings personal judgment was given against the builders. This, in my opinion, should not have been given without the leave of the court, but that is not a matter in which the appellants have any interest, nor does it constitute a defence to the enforcement of the privilege. Making the debtor a party simply for the purpose of enforcing the privilege against the appellants' immovable does not, in my opinion, contravene s. 24 above cited.

Another objection taken was that the memorial as registered was illegal because it was not a statement of the respondent's account of materials supplied for the houses in question, but a copy of its current account with the builders, which commenced at a period prior to February 9, 1927, and included materials not furnished for the construction of the buildings upon the appellants' land.

The code requires the memorial registered to specify "the nature and price of the materials supplied" to the builder, and such materials are all that should be set out in the memorial. If, however, materials are included in the account which should not have been included and for the price of which a court would not decree a privilege, how can that invalidate the memorial or its registration? At the hearing the secretary of the respondent company checked over the accounts and testified as to the materials which were delivered for the construction of the buildings in question, and the payments applicable thereto. This put the court in possession of the facts necessary to enable it to determine the amount for which the respondent should have a privilege provided all the materials furnished by it for the construction of the buildings entered into them. There is, in my opinion, no substance in this objection.

The two substantial grounds of appeal are: (1) That the appellants' contract with the builders was for the construction of nine houses, each house to be on a separate and distinct lot with a separate price fixed for each; that each lot, with the house thereon, constituted a separate immovable and, therefore, the right of the respondent to a privilege for materials supplied was a privilege against each separate immovable and was limited in amount to the price of the materials furnished by the respondent which were incorporated in each house respectively.

(2) That if the respondent was entitled to claim a privilege on all the houses and lots as one immovable, it had failed to establish the quantity of materials supplied by it which had entered into the construction of the houses.

In answer to the first of the above grounds of appeal the respondent cited the case of *Munn & Shea, Ltd.* v. *Hogue Limitée* (1), which was affirmed by this court (2). That case, it was contended, governed the case at bar and con-

(1) (1927) Q.O.R. 44 K.B. 198. (2) [1928] S.C.R. 398.

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clusively established the respondent's right to a single privilege covering the nine lots. In that case one Davis being the owner of twelve lots decided to erect thereon thirteen houses. He applied to Hogue Limitée to supply him with the materials necessary therefor. This that company agreed to do. Nothing was said as to any part of the materials being allocated to any particular house. Materials were furnished to the amount of over $11,000 and incorporated into the thirteen houses, but no account was kept of the amount which entered into the construction of each house. Davis paid Hogue Limitée for all materials supplied by it with the exception of $3,643. For that sum the company registered a privilege against five of the lots with the houses thereon. These five houses had, while in course of construction but before the registration of the claim of privilege, been sold by Davis to Munn & Shea, Ltd. In that case, as in the one now before us, it was argued that it was illegal to register a privilege for the full amount of the claim against all the lots as a whole. This argument was rejected in all courts and Hogue Limitée was held entitled to claim a privilege on the five lots. The ground upon which the decision is based is stated by Lafontaine C.J. in his judgment in the Court of King's Bench, as follows:—

Comme on l'a vu, le défendeur a donné à l'intimée une commande du bois nécessaire à la construction de 13 maisons érigées sur 12 lots sans spécifier aucune des maisons ou aucun lot en particulier et sans faire la division des matériaux pour chacune des maisons ou chacun des lots. Le débiteur n'avait qu'un chantier et l'intimée a livré ses matériaux à l'endroit qui lui a été indiqué. En sorte que le défendeur a donc, lui-même considéré ses 12 lots comme ne faisant qu'un seul immeuble et il serait bien difficile sinon impossible à un fournisseur de matériaux d'indiquer la quantité et l'espèce de matériaux entrés dans la construction de chacune des maisons construites par le défendeur. Comme de sa nature le privilège est indivisible et qu'il garantit la créance toute entière, il s'en suit que le privilège de l'intimée porte sur les 12 lots compris comme un tout et, par conséquent, sur chacun d'eux.

In this court all the judges who heard the appeal were satisfied on the argument that Hogue Limitée was entitled to a single privilege on the lots claimed. This was expressed in the written judgment by the words

there seems to be no ground for disagreeing with the views of the Court of King's Bench.

It was not our intention by that observation to indicate that we accepted every expression which had been used in that case in the broadest sense of which it is capable, but that we accepted the conclusion of the court, and the prin-

ciple of the decision as involved in that conclusion; the reasoning, in other words, as applied to the circumstances of that case. It remains now to apply that decision and to determine whether or not it governs the case at bar.

For the appellants it was contended that it was distinguishable: (*a*) Because in that case it was the owner of the lots who contracted for the materials; whereas in the present case it was the builders who contracted with the respondent, and a representation by the builders that they were to be used in the construction of nine houses for the appellants was not evidence that the appellants were treating the land on which they were to be erected as a single parcel or tract.

(*b*) That in the former case the owner was erecting thirteen houses on twelve lots, which shewed clearly that he was not using each lot as a distinct and separate immovable; whereas in the present case each house was to be erected on a separate lot with a separate price fixed for each.

Art. 2013 (*e*) C.C. gives to the supplier of materials a privilege on the immovable in the construction of which the materials supplied to the proprietor or builder have been used. Under the Code the privilege attaches when the materials are supplied to the builder to the same extent as it does when they are supplied to the proprietor, but when the materials are contracted for by the builder the person supplying them must notify the proprietor that he has contracted with the builder for the delivery of the materials. The respondent in the present case having delivered materials to the builders in accordance with its contract and having given to the proprietor the notice required by the code, was entitled to a privilege against the proprietor's immovable to the same extent as if the proprietor himself has contracted for the materials.

Then as to each house erected on a separate lot constituting a separate immovable:

Art. 2013 C.C. reads as follows:

> 2013. The workman, supplier of materials, builder and architect have a privilege and a right of preference over all the other creditors on the immovable, but only upon the additional value given to such immovable by the work done or by the materials.

The word "immovable" here means the premises to which additional value is given by the work done or the

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materials used. That is the land and any building erected thereon forming in law a part thereof. (Art. 376 C.C.) When the building is erected, as it is attached to and forms part of the land, the privilege covers both land and building, but is limited in amount to the additional value given to the land by the materials used in the building. How much land shall be considered as constituting one immovable depends upon the quantity allotted to it by the proprietor. This in practice is, speaking generally, largely determined by the character of the building to be erected. The subdividing of a piece of land into lots and the registration of a plan thereof which gives each lot its own distinctive number is some evidence that the owner will thereafter consider—as the law certainly considers (art. 2167-8 C.C.)—each lot as a separate parcel, and the same conclusion might be drawn where a man acquires lots according to a registered plan of subdivision. The fact, however, remains that notwithstanding the subdividing of a piece of land and the registration of a plan thereof, the owner of contiguous lots may, for building purposes, use two or more of them as one parcel or tract, in which case a row of connected houses on these lots may properly be regarded as one structure or, with the lots, one immovable, as was decided in the *Munn & Shea* case (1).

If nothing more appears than that a proprietor has built, or caused to be built, a house or other building upon a piece of land which comprises a single lot according to a registered plan, *prima facie* the boundaries of the lot would be the boundaries of the immovable. Where, however, as in the case before us, the proprietor of a number of contiguous lots erects thereon a number of buildings, the question is: What constitutes the immovable on which a privilege for materials supplied and used will attach? The answer furnished by the *Munn & Shea* case (1) is: "Such lot or lots as the proprietor for building purposes uses as one parcel or tract." In that case, however, the court was not dealing with buildings entirely unconnected with each other and erected wholly upon individual lots. It was there not called upon to determine the character of the evidence which in such a case would be required to establish that the proprietor was, for building purposes, using two or more

(1) [1928] S.C.R. 398.

contiguous lots as one parcel. There the evidence shewed that the proprietor was building thirteen houses on twelve lots. The houses were all physically joined together and anyone could see at a glance that he was really erecting only one structure. If an intending purchaser of one of the houses had looked at the house it would have been apparent to him that it was physically connected with the house on either side, and he would thus have been put upon his guard to make inquiries as to the privileges against which he must protect himself in case he purchased.

In the present case we have no such evidence. Here we have proprietors who cause to be erected on their nine lots a central house situated wholly on one lot and entirely separate from the adjoining houses. Then we have two pairs of semi-detached houses, each pair wholly erected on two lots and entirely separate from the next pair which also occupies two lots. Under these circumstances can it reasonably be said that the proprietors were using their nine lots as one parcel or tract for building purposes, simply because they made a contract for the erection of nine houses thereon according to a plan which shews that each house is to occupy only one lot? In other words was the making of one contract for all the buildings they intended to erect on the lots sufficient to establish the user by them of the nine lots as one parcel, or must there be on the lots themselves some evidence that they are being used as a single tract for one structure, to justify the application of the principle laid down in the *Munn & Shea* case? (1).

In determining this question regard must be had to the provisions of the law relating to the registration of titles to land according to the cadastral numbers of the lots into which it is subdivided, as well as to the provisions which give to the supplier of materials a privilege on the immovable of the proprietor on whose lot or lots a building is erected. The registration provisions are designed to maintain security of title. The provisions relating to a right of privilege are designed to give a supplier of materials security on the immovable of the proprietor although they do not define just what in each case shall constitute the immovable on which security is given. The privilege provisions of the code and in particular those which provide

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for a privilege without registration until the expiration of thirty days after the completion of the building, constitute an invasion of the strict principle of the registration provisions. The precise extent of that invasion may, in particular cases, be a nice question. We may, however, I think, start with this, that the legislature did not intend the privilege provisions of the code to invade the principle of the registration provisions beyond what was necessary to give effect to the privilege that was being granted, which privilege was intended to be a real protection and to be capable of being successfully worked out in practice. From the fact that the privilege is effectively constituted without registration at the date when the obligation of the proprietor or contractor arises (1), and continues to be effective without registration until thirty days after the completion of the building (provided the materials supplied have been used therein) I think the inference may reasonably be drawn that the legislature did not apprehend that, in the absence of anything on the register, anyone during that period would be misled into believing that no privilege attached. The reason for not requiring notice to be given by means of the register to intending purchasers, or others desiring to acquire an interest in the immovable, must, in my opinion, have been that notice by registration was considered unnecessary in view of the notice furnished by a building under construction or newly completed on the land sought to be dealt with. Anyone proposing to deal with such land would know, or would be presumed to know that privileges might attach thereto. Giving full effect, therefore, to the privilege which the code gives to a supplier of materials, I am of opinion that the evidence necessary to justify the conclusion that a proprietor is using a number of contiguous lots as one parcel for building purposes must be so open and visible that anyone viewing the premises would see thereon sufficient to indicate to an ordinary man the likelihood or probability that the lots were being used as a single parcel. The *prima facie* inference that each separate building with the lot or lots on which it stands is an immovable in itself, must be displaced by something sufficient to put an ordinary man, be he a supplier of materials or an intending purchaser, on inquiry

(1) [1928] S.C.R. 398.

to ascertain if, for building purposes, the lots were being used as a single parcel to which would attach a single privilege for the price of materials used in any building erected thereon.

In the present case I fail to find on the premises anything which, in my opinion, would be sufficient to bring home to the mind of a supplier of materials, or an intending purchaser, the likelihood or probability that the appellants for building purposes were using the nine lots as one parcel. Only the semi-detached houses are physically connected and have the appearance of being one structure. Anyone looking at the centre house would conclude that it with the lot on which it stood constituted a separate immovable. He would also conclude that each pair of semi-detached houses with the ground belonging to them, according to the registered plan, was likewise an immovable within the meaning of art. 2013 C.C. In my opinion, therefore, the application of the principle laid down in the *Munn & Shea* case (1) must be limited in the case at bar, to each pair of semi-detached houses. That is to say, the respondent here, provided he registered a proper memorial, was entitled to a privilege on the detached house for the unpaid price of the material supplied by it which entered into the construction of that house. It was also entitled to a privilege on each pair of semi-detached houses for the unpaid price of its materials entering into the construction of each pair respectively. But it was not entitled to a single privilege on all the lots and houses for the balance of its claim for materials supplied which entered into the different buildings erected on the nine lots.

The respondent not being entitled to a single privilege on the nine lots, is its registered memorial sufficient to support a privilege on any one of the immovables against which it might elect to proceed? It may be that it is, but we are not called upon in this case to decide that question. Before a privilege can be decreed against any one of the appellants' immovables the respondent must establish the price of its materials which went into that immovable. That has not been done with respect to any one of the immovables.

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For the respondent it was argued that if the appellants' contention prevailed it would cast upon a supplier of materials the task of keeping a specific tally of the quantity of its various materials used in the construction of each separate building and that, under modern conditions, this task was an impossible one. That may indeed be so, but it must be borne in mind that the right to a privilege for material supplied and used in the construction of a building is purely a statutory right and extends only as far as the legislature has seen fit to grant it. Whether a more extensive right should be granted is a matter for the consideration of the legislature but not for the courts.

I would allow the appeal with costs and disallow the respondent's claim.

Appeal allowed with costs.

Solicitors for the appellants: *Brosseau & Brosseau.*

Solicitors for the respondent: *Lafleur, MacDougall, Macfarlane & Barclay.*