

1928

MUNN & SHEA LIMITED (INTERVENANT). APPELLANT;

*Feb. 23.

AND

*Apr. 24.

HOGUE LIMITEE (PLAINTIFF).....RESPONDENT;

AND

H. DAVIS(DEFENDANT)

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

Privilege—Lien—Claim—Supplier of materials—When constituted—Registration—Arts. 2013e, 2103 C.C.

The privilege of the supplier of materials is effectively constituted without registration at the date when the obligation of the owner or the contractor arises; but it can only be preserved by registration of the statutory memorial within the statutory period, i.e., by registration of it before the expiration of thirty days after the completion of the work.

Judgment of the Court of King's Bench (Q.R. 44 K.B. 198) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J., which had dismissed the appellant's intervention and maintained the respondent's action.

An action was instituted by the respondent against the defendant to have it declared that it had, as supplier of materials, a privilege for a sum of \$3,643 affecting lots belonging to and being in possession of the defendant. The respondent also prayed that the defendant be condemned to pay the said sum of \$3,643. The respondent, having sold and delivered to the defendant Davis materials for the construction of a series of thirteen contiguous houses, erected on twelve lots, and having received payments on account after the delivery of the materials, had still a claim amounting to \$3,643 and registered against certain of the lots on which the aforesaid constructions had been erected a declaration of privilege in the sum of \$3,643. By the conclusions of its action, the respondent prayed that Davis be personally condemned to pay

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

(1) (1927) Q.R. 44 K.B. 198.

this sum and that the immovables on which the constructions were erected be declared affected by privilege for the payment of the said sum. Davis filed a defence but did not appear when the case came before the Superior Court. Before the hearing, the appellant intervened in this cause and prayed for the complete dismissal of the action, pretending that it had become owner of the immovables, against which the declaration of privilege had been registered, before the registration had been effected of this declaration, and that, consequently, the registration had been made *super non domino*.

By a second intervention, the appellant pretended that the materials furnished by the respondent on the lots of land affected by privilege, were not worth the sum claimed, but in all at the most were not worth more than \$1,506.20, and the appellant tendered this sum with a further amount for the costs, in all \$1,700, which the appellant deposited with its intervention and prayed for the dismissal of the action inasmuch as the ratification of the privilege was concerned and asked that this privilege be radiated. The judgment of the Superior Court condemned Davis to pay the total amount claimed and maintained the privilege against the immovables thereby affected for the full sum.

C. Laurendeau K.C. and *A. E. J. Bissonnet K.C.* for the appellant.

J. L. St.-Jacques K.C. for the respondent.

The judgment of this court was delivered by

DUFF J.—I have come to the conclusion that this appeal should be dismissed. The only question requiring discussion is that which arises upon the contention of Mr. Laurendeau as to the effect of article 2103 C.C. as enacted by 7 George V (1916) c. 52. The other contentions advanced by him in support of the appeal were fully discussed on the argument, and concerning them, it is now sufficient to say that there appears to be no ground for disagreeing with the views of the Court of King's Bench.

Mr. Laurendeau's contention is that by force of the enactment just mentioned, of 1916, the lien claimant in respect of materials has a privilege which does not come into

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existence until the registration of a memorial pursuant to that enactment. If this is the law, admittedly the appellants must succeed, because they acquired their title prior to the registration of any memorial by the respondent. On behalf of the respondent, while it is not disputed that the lien of a furnisher of materials can only be preserved by registration of the statutory memorial within the statutory period, that is to say, by registration of it before the expiration of thirty days after the completion of the work, it is maintained that the privilege may nevertheless be effectively constituted at an earlier date, at the date when the obligation of the owner or the contractor arises; and it was then, it is said, that the privilege now asserted came into being, and if the respondent is right in this, the appeal must fail.

It is necessary to consider article 2013*e* C.C. as enacted by 7 Geo. V (1916), c. 52, and in its amended form, as enacted by 14 Geo. V (1924), c. 73. First then, article 2013*e* as enacted in 1916 is one of a series of articles which by that enactment were inserted in the Civil Code as articles 2013, and 2013*a*, 2013*b*, 2013*c*, 2013*d*, 2013*e*, 2013*f*; and by the same statute, article 2103 of the Civil Code was repealed as to its first paragraph which was replaced by a new paragraph.

Article 2013 C.C. as enacted in that year provides generally for the privilege of the workman, the supplier of materials and the builder and the architect, while the sub-articles contain special provisions dealing severally with these kinds of privilege. Article 2103 (1) C.C. is as follows:

The privilege of every person, except the workman, mentioned in article 2013, is created and preserved by registration within the proper delay at the registry office of the division in which the immovable is situated, of a notice or memorial, drawn up in the form of an affidavit of the creditor or his representative, sworn to before a justice of the peace, a commissioner of the Superior Court, or a notary, setting forth the name, occupation and residence of the creditor, the nature and amount of his claim, and the cadastral number of the immovable so affected.

This, it is said, is in effect a declaration that the privilege, in any case but that of the workman, does not arise until the registration of the notice or memorial there provided for. It may be, however, that in the case of the supplier of materials, the notice mentioned in article 2103 (1)

C.C. is intended to be the same notice as that prescribed for in the second paragraph of article 2013e C.C. (as enacted in the same statute), which I copy:—

Such privilege, however, shall take effect only upon the registration of a notice, given to the proprietor or his representative, informing him of the nature and cost of the materials to be supplied, as well as the cadastral number of the immovable property affected, and shall apply only to those furnished, or those specially prepared and not delivered, for the immovable in question, after the receipt of such notice by the proprietor, and its registration.

Article 2013e C.C. provides only for this notice, article 2013f C.C., on the contrary, which relates to the lien of the architect and the builder, provides only for a memorial. It may be possible to read the adjectival clause in article 2103 (1) C.C. beginning “drawn up in the form of an affidavit,” as relating only to the immediate antecedent, that is to say to the word “memorial,” and not to “notice”; and to treat the words “notice or memorial” distributively, one referring to the “notice” provided for in article 2013e C.C., and the other to the “memorial” prescribed in article 2013f C.C. In support of this it might be urged that the contents of the “notice” are fully set forth in article 2013e C.C., while those of the memorial are not stated in article 2013f C.C.

No doubt, if the Act of 1916 stood alone, this view might present rather serious difficulties, but article 2013e C.C., as amended by the statute of 1924, seems to remove these difficulties. It is in these words:—

Article 2013e of the Civil Code, as enacted by the Act 7 Geo. V. Chapter 52, section 3, is amended:

(a) By replacing the second paragraph thereof by the following:

“However, in the case where the supplier of materials contracts with the proprietor himself, such privilege is conserved only by registration, before the expiration of thirty days after the end of the work, of a memorial containing:

1. The names, surname and domicile of the creditor and of the debtor;
2. The description of the immovable affected by the privilege;
3. A statement of the claim specifying the nature and price of the materials supplied to the proprietor or specially prepared to be supplied to him.

In the case where the supplier of materials contracts with the builder, he must notify the proprietor of the immovable in writing that he has made a contract with the builder for the delivery of materials. His privilege is conserved for all the materials supplied after such notice provided he registers, within thirty days after the end of the work, a memorial similar to that mentioned in the preceding paragraph.

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This enactment manifests quite unmistakably an intention to provide fully for the procedure in connection with the lien of the furnisher, to the exclusion of article 2103 (1) C.C.; and by its terms it plainly imports, in conformity with the general principles of law, that the special office of the registration therein prescribed is not to give birth to the right, but to protect and conserve a right otherwise constituted. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. E. J. Bissonnet.*

Solicitors for the respondent: *St-Jacques & Fillion.*
