

Div. Ct.]

McCULLY ET AL. V. ROSS ET AL.

[Div. Ct.]

REPORTS.

ONTARIO.

DIVISION COURT—COUNTY OF NORFOLK.

McCULLY ET AL., Primary Creditors, v.
ROSS ET AL., Primary Debtors, ROWLEY,
Garnishee.

Mechanics' lien—Garnishment—Priority.

Ross & Co. contracted to build, for a fixed amount, a kitchen for R., and purchased materials for the work from L., and sublet the contract to other mechanics. He absconded without paying L. or the sub-contractors, before the contract was completed. R. took possession and adopted the work, such as it was, and admitted a debt due to R. & Co., which was garnished by McC. and P., under two D. C. attachments.

After the service of the garnishee summons, but within thirty days after furnishing the last of the material, L. and some of the workmen who did the work on the building filed their liens and took proceedings under R. S. O. cap. 120, and intervened in the garnishee suit, claiming to be entitled under their liens to the money in R.'s hands, and that the proceedings under that act gave them preference over the attachment.

Held, that the garnishee proceedings bound the debt as against the lien holders, and that the garnishors must be paid first out of the fund in the hands of R.

[Hughes, J.—St. Thomas, Dec. 12, 1885.]

This was a case in which a question arose under the garnishee clauses of the Division Courts Act, and the Mechanics' Lien Act, as to priority on the part of two garnishors, and as to preference on the part of certain claimants, who had supplied materials and labour to the primary debtors, who were contractors for the building of a kitchen as an addition to the house of the garnishee.

The facts of the case appear above and in the judgment of

HUGHES, Co. J.—An admitted balance is due by the garnishee to the primary debtors, the contractors, and he stands ready to pay \$79 as that balance. The balance he has not paid into Court, but holds it in his hands ready to pay over, on the decision and order of the Court being given, so that the contention forms an interesting interpleader between the garnishors and the claimants, under the provisions of the 144th section of the Division Courts Act.

It is unlike the case of *Lang v. Gibson*, 21 C. L. J., 74, cited in the argument, for reasons which will hereinafter appear.

Whatever may be the provisions of other statutes respecting the effect of garnishee proceedings, the clauses of the Division Courts Act for the attachment of debts are so clearly defined, and to my mind, so unqualified, that I have in view of de-

cisions delivered in garnishee proceedings in England, and decisions under the Statute of Frauds, to which I shall allude further on, no hesitation in saying that they fortify the opinion I gave at the trial of these cases, as to the respective rights of the garnishors and of the claimants to the balance in the hands of the garnishee.

I am not prepared to say what my decision would be, nor is it necessary for me to either draw or not to draw a distinction between these claimants and the primary debtors supposing the question arose in another form, as was the case in *Lang v. Gibson*. It is enough for me to consider this case upon its merits, and to decide it as the law applies to these parties circumstance as they are. The case is not, as has been suggested, on all fours with *Lang v. Gibson*.

It is well understood that, whatever may be the right of a contractor, sub-contractors, labourers and material men, have to stand upon the contract between the owner and the contractor; and the owner is not obliged to pay any greater or other sum or amount than the price stipulated or agreed to be paid by the contract—their remedy is confined to money due to the principal contractor for the work which he agreed to do, but which the sub-contractor or mechanic has actually performed or for the materials which the contractor was to have furnished, but which the material-man supplied. It does not extend to money payable to the contractor on any other account; and for the labour so performed, and the materials so supplied, a lien may be acquired to the extent of the contract price. To that amount the lien is limited, and to the extent of any balance due by the owner to his contractors under the contract with him, they may recover and have the right to lien, but only on such balance; so that primarily, under our statutes, the extent to which the law has secured these claims has been to give to the contractor a lien upon the premises for the entire work and materials expended by him, and to the sub-contractors, and labourers, and material-men, a lien to the extent that there may be funds in the hands of the owner and due to the contractor (see Phillips on Mechanics' Liens, sec. 211. etc.,) and no more.

It is urged for these claimants that their's are privileged claims—rights of priority over these garnishors, who are prior in point of time. This contention must have the direct sanction of statutory law, or none such exists; for there is no sanction under the common law for the contention of either of the parties in the question before me.

Do we find in any of the statutes affecting the rights of these parties a provision that the liens or