

The lands in question not being subject to a lien under the Act, it cannot properly be held that the Act, which fundamentally aims at giving a lien to specified classes of persons who may assert and establish claims for work or materials, and who can as a result acquire liens thereon and utilise these to obtain payment of their claims, can be effectively resorted to by any person where the lands from the outset could not be made legally liable to any lien thereunder.

Sections 6 and 49 must, when read together, be construed to refer only to lands, including railway lands, to which the Act can apply, but not to railway lands to which liens can in no case under the Act legally attach.

If the construction now suggested as the proper one were not so, a person having a claim for work or material might, as a claimant under the Act, and by asserting that claim thereunder and in the manner therein provided, even though in no circumstances could he or any other claimant convert a claim into a lien, compel his adversary to fight the claim itself, whatever the amount, in the proceedings thus commenced and before the tribunal provided in the Act, being thus deprived of his right of defence before the usual tribunal.

*Kendler v. Bernstock* (1915), 33 O.L.R. 351, 353, distinguished.

A further argument advanced on behalf of the plaintiffs was, that a charge attached to the percentage required to be retained by the owner under sec. 12 of the Act. But, when sub-sec. 3 of sec. 12 is referred to, it is plain that it is the lien which is to be a charge upon the amount so directed to be retained; and, if no lien is established, the section cannot apply so as to aid the claimant.

It was unnecessary to deal with the third question.

The defendant railway company's appeal should be allowed with costs, and the plaintiffs' cross-appeal dismissed with costs.

MULOCK, C.J., Ex., agreed with SUTHERLAND, J.

RIDDELL, J., agreed in the result, for reasons stated in writing.

LATCHFORD and KELLY, JJ., agreed with RIDDELL, J.

*Defendant company's appeal allowed; plaintiffs' appeal dismissed.*