

Div. Ct.]

McCULLY ET AL. V. ROSS ET AL.

[Div. Ct.]

I apprehend, may be held to apply to lien holders whose liens attach to the debt before the service of the process or to persons who hold a claim prior, in point of time, by assignment, but not to those who take proceedings subsequent to the garnishee proceedings and who seek for a lien, not upon the debt due by the garnishee, but upon his real property to the extent of all that he justly owes the primary debtor. The creditors who (like the claimants in this case) have taken proceedings under the Mechanics' Lien Act cannot "be remitted to their original rights" in respect of the debt attached, simply because that when these proceedings were taken they had no "rights" beyond that of being creditors, with the right to sue or take any remedy they chose. And it cannot be reasonably contended now that because they have taken their proceedings under the Mechanics' Lien Act that they can get in and frustrate or make ineffective prior proceedings which the garnishors have legally taken and are legitimately pursuing under another Act of Parliament. In my opinion neither the words in the parenthesis of the 137th section nor those of the 142nd section of the Division Courts Act apply to them.

It will thus be plainly seen that I do not agree in the opinion of His Honor Judge McDougall, as expressed in the case of *Lang v. Gibson*, 21 C. L. J., 74, nor do I see the application of the cases cited in his judgment, for reasons which I shall give further on.

In *Ex parte Foselyne*, 8 Ch. D., 327, it was held that the moment the order of attachment was served upon the garnishee, the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor; that the garnishee could then only pay his debt to the judgment creditor of his original debtor; that the property in the debt was transferred, and there was a complete and perfect security the moment the order for attachment was served. The judgment in this case overruled several previous decisions on this point.

I regard the Mechanics' Lien Act as affording a lien to the persons described therein, in respect of the subject of such lien, so as to make a charge upon the land to the extent of an unpaid account or demand against the lien holder for such materials or labour "upon any amount payable by the owner of the land under the lien, but not upon what the law may compel him to pay to some other attaching creditor."

The charge created is upon the money payable by the "owner" to the person entitled to the lien, and not upon the land, and the person entitled to the charge must first prove his right as against all other

rightful claimants and the right may be enforced by suit in default of payment by the owner of what he may justly owe the primary debtor. It is, in other words, another kind of attachment, and for enforcing payment by holding the land as security.

My view is strengthened by a reference to the broad provision of the 124th sec. of the Division Courts Act, which is introductory to the clauses relating to garnishee proceedings, for it says: "When any debt or money demand . . . is due and owing by any party to any other party . . . and any debt is due, or owing to the debtor from any other party; the party to whom such first mentioned debt is due and owing . . . may attach and recover in the manner herein provided any debt due or owing to his debtor from any other party . . . or sufficient thereof, to satisfy the claim of the primary creditor—subject to the rights of other parties to the debts owing from such garnishee." I do not see what could be broader or plainer in its language, or how a provision of law could be more absolute in its terms than this. A creditor may "attach and recover," and the debt is to be attached and bound until he recovers judgment, in order to satisfy, and to the extent unsatisfied on his judgment; and any payment by a garnishee into Court, or to the primary creditor, of the debts attached, is declared to be a discharge to the extent of the debt owing from the garnishee to the primary debtor.

It was suggested on the argument that had the garnishee paid the money claimed here into Court, it would have been a bar to further proceedings; but that inasmuch as he did not pay it into Court, the remedy of the primary creditors has gone, and the subsequent proceedings under the Mechanics' Lien Act by other creditors cut out the claim of the primary creditors, and give it to the lien holders under the Mechanics' Lien Act; but that argument amounts to a mere play upon words—as if the provisions of a statute were to be subjected to defeat by those who seek to snatch an advantage to the prejudice of those who fairly and squarely bring themselves within its provisions. A payment of the money into Court may be made under the statute by a garnishee doing it at once after the attaching process is served, or upon the order of the Court after judgment is rendered, and the doing of that is declared by the statute to operate as, and to have the effect of, a discharge at law, to the extent of the debt owing, and the amount paid in; and once discharged the law is not so contradictory as to change it in favour of any one else: much less to revive it for the benefit of another creditor.

Had a provision such as is found in the Creditors'