BOARD OF TRUSTEES OF ROCKY MOUNTAIN SCHOOL DIVISION No. 15 *(Defendant)* ..... APPELLANT;

AND

ATLAS LUMBER COMPANY LIMITED *(Plaintiff)* ..... RESPONDENT.

1954
*May 6
*Oct. 5

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Mechanics' Liens—Materialman's—Whether materials furnished under one continuous contract when contract abandoned and work completed by owner—The Mechanics' Lien Act, R.S.A. 1952, c. 236.

Where materials are furnished a contractor for the erection of a school but, due to the contractor's death, the contract with the school board is abandoned by his estate, and further materials are supplied on the owner's (the school board's) order and charged to it, the two contracts cannot be tacked together to enlarge the time specified in *The Mechanics' Lien Act,* R.S.A. 1952, c. 236, s. 24, for registering a lien for materials furnished under the first contract.

Held: (Reversing the judgment of the Appellate Division of the Supreme Court of Alberta, (1953) 8 W.W.R. (N.S.) 513) that the materials furnished after the contractor's death were not supplied under the contract entered into by him with the appellant Board of Trustees.

Per: Locke and Cartwright JJ.: *Union Lumber Co. v. Porter,* (1908) 8 W.L.R. 423 not followed; *Whitlock v. Loney* (1917) 3 W.W.R. 971, 10 Sask. L.R. 377 and *Fulton Hardware Co. v. Mitchell* (1923) 54 O.L.R. 472, approved.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) by which the judgment of the trial judge, McLaurin J. (now Chief Justice of the Trial Division) which dismissed the respondent's claim to a lien under *The Mechanics' Lien Act* upon a school building erected for the appellant was set aside.

C. W. Clement, Q.C. and *D. C. Bury* for the appellant.

S. J. Helman, Q.C. for the respondent.

The judgment of the Chief Justice and of Estey J. was delivered by:—

THE CHIEF JUSTICE:—The Appellate Division of the Supreme Court of Alberta unanimously reversed the judgment at the trial and, as I find myself in disagreement with that result, I propose, as shortly as may be, to state my reasons for this conclusion.

*PRESENT: Kerwin C.J., Rand, Estey Locke and Cartwright JJ.

(1) (1953) 8 W.W.R. (N.S.) 513; [1953] 3 D.L.R. 45.

1954

BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. NO. 15 v. ATLAS LUMBER CO.

Kerwin C.J.

In my opinion, the main point to be determined is one of fact. Much was made by the respondent of the difference between the evidence of Whaley at the first sittings and when the trial was re-opened. While on both occasions he was positive that the delivery of most of the lumber sold on November 22, 1949, was to the old school (part having been taken by him from the respondent's yard), he had stated at the first trial that all the materials had been used for toilet doors, catwalk and coat racks in the latter, while on the second occasion he admitted that in the old school the lumber was therein made into bookcases and cabinets which were then taken to the new school where they were installed. It also appeared that when Whaley's own claim for lien was filed a mistake was made as to the dates upon which he had worked for Matatall. The trial judge, having heard both stories, believed that Whaley had been honestly mistaken at the first trial as to what had happened to the lumber and that the error in his claim for lien was due to carelessness. The trial judge preferred the evidence of Whaley where it was in conflict with that of others, and I can find no ground for disagreeing with him.

I also agree that Matatall's contract with the appellant had been abandoned by his executrix prior to November 22, 1949. Moreover, there is no doubt that the order for lumber on that date was given by Whaley, nor that he was then employed by the appellant Board and not by Matatall's executrix. That is made clear not only by Whaley, but also by James Heron, the respondent's retail manager at Rocky Mountain House. The yard slip was made out in the name of the appellant and the items were charged to it in the respondent's books and payment therefor was made by the appellant to the respondent. At least part of the respondent's account against Red Deer Construction Co. (under which name Matatall had carried on business), which included the item of November 22nd, was compiled after the commencement of the proceedings, since there is an entry under date of December 1, 1949, of $5 filing fee. That is the date of the claim for lien filed by the respondent, in which document it is stated that all materials were furnished "on or before the 2nd day of November A.D. 1949. The claimant ceased to furnish materials on the 2nd day of November, 1949."; and, while an attempt was made to explain this, I

agree with the trial judge that the explanation is not satisfactory, particularly when it is borne in mind that the amount of the claim, $7,402.48, did not include the item of November 22, 1949. The account sent by the respondent to the appellant shows an item of $26.55, represented by the yard slip of November 22, 1949, which includes $21.20 for the lumber in question and the balance for lumber for two different schools of the appellant.

Under these circumstances the transaction of November 22nd does not support the respondent's claim for a lien. While section 6(1) of *The Mechanics' Lien Act,* R.S.A. 1942, c. 236, gives a lien for materials furnished for any owner, contractor, or sub-contractor, the enactment does not mean, as contended by counsel for the respondent, that the materials may in any case be furnished to any one of these three without regard to the contract under which they were so furnished. Nor can there be any presumption under s. 6(2) of the Act:—

> Materials shall be considered to be furnished to be used within the meaning of this Act when they are delivered either upon the land upon which they are to be used or upon some land in the vicinity thereof, designated by the owner.

because, while the appellant was, on November 22, 1949, the owner of the new school and the respondent might have a lien thereon if it was not paid, there was no agreement between the respondent and Matatall, or his executrix, for the delivery of this lumber so as to keep in force any lien it might have by virtue of the original contract. S. 22(1) was also relied upon, which section is in these terms:—

> A lien in favour of a contractor or sub-contractor in cases not otherwise provided for, may be registered before or during the performance of the contract or sub-contract, or within thirty-five days (or in the case of oil or gas wells or oil or gas pipe lines within one hundred and twenty days) after the completion or abandonment of the contract or sub-contract, as the case may be.

As applied to the present appeal, the respondent's sub-contract with Matatall was not abandoned, as it was merely a contract for the supply of materials as ordered by him from time to time. The section has no application to the abandonment by the executrix of Matatall of the contract between the latter and the appellant.

1954

BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. NO. 15 v. ATLAS LUMBER CO.

Kerwin C.J.

It is unnecessary to consider the cases cited as, in my view, they have no relation to the facts of the case. The appeal should be allowed, the judgment of the Appellate Division set aside, and that of the trial judge restored with costs throughout.

RAND J.:—I think it the clear intention of the statute that the liens created shall be related to the mediate or immediate contracts under which the particular work is done or the particular materials furnished. S. 14(3) is explicit on this:—

> (3) The lien shall be a charge upon the amount directed by this section to be retained in favour of lienholders whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

Although the date shown on the claim of lien as that of the last delivery of materials is November 2nd, evidence accepted by the trial judge puts that date as October 26th and establishes the fact that the materials delivered thereafter were ordered by and charged to the School Division. Assuming that they were used for the purposes within the construction contract, there would be no statutory holdback because the district was the purchaser and the work was done by its own employees. So far as the respondent Lumber Company was entitled to a lien, it would rank with those under the main contract.

In ordering the materials, the School Division was not acting under any contractual power to engage the credit of the main contractor; it was acting either independently of the contract, by way of making an addition to the building, or as an owner to complete work which the contractor had abandoned or in relation to which he had committed a breach of his obligation. In either view, the capacity of the company was not that in which the goods were supplied to the contractor and their delivery cannot be incorporated with those to the latter.

It is then argued that by sending a copy of the invoices to the School Division as the materials were delivered there was given a notice in writing of the lien within the meaning of s. 14(4) of the statute. But s. 6 provides for a lien "unless he (the contractor) signs an express agreement to the

contrary". The delivery of goods does not, then, necessarily raise a lien nor does the fact that the goods are furnished on credit constitute notice that a lien is claimed.

The Act undoubtedly is to be interpreted to further its purposes which are to provide security for those who contribute work or materials to the construction of an improvement. But the legislature has made it clear that that security may, in the absence of a notice, be limited to the amount of the contract price unpaid and that the lien must be registered within a specified time. To declare that it shall "absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof" (s. 24(1)) leaves no room for judicial indulgence. The lien can be registered before or during the supplying of material or within thirty-five days after the last material has been furnished; and the notice of the claim of lien to the owner affecting his payments to the contractor may be given at any time after the lien arises. With this ample time within which a supplier may act, it would be a distortion of the statute to stretch the interpretation of its provisions to the extent argued by Mr. Helman.

For these reasons the appeal must be allowed and the judgment at the trial of the issue restored with costs throughout.

The judgment of Locke and Cartwright JJ. was delivered by:—

LOCKE J.:—This is an appeal by the Board of Trustees of Rocky Mountain House School Division No. 15 from a judgment of the Appellate Division of Alberta by which the judgment rendered at the trial by McLaurin J. (now Chief Justice of the Trial Division) which dismissed the respondent's claim to a lien under *The Mechanics' Lien Act* upon a school building erected for the appellant at Rocky Mountain House was set aside.

On January 6, 1949, the School Division entered into a contract with Hugh Matatall, a contractor carrying on business under the name of Red Deer Construction Company, for the erection of a school-house on a portion of its property at Rocky Mountain House. By the contract, Matatall agreed to provide all the materials and perform all the work shown on the drawings and described in the specifications

1954

BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. No. 15 v. ATLAS LUMBER CO.

Locke J.

prepared by Mr. Campbell-Hope, an architect, for the sum of $54,900. Payments were to be made upon the architect's certificate on or before the 10th day of each month for eighty per cent of the value, proportionate to the amount of the contract, of labour and materials incorporated in the work or delivered at the site up to the first day of that month as estimated by the contractor and approved by the architect, less the aggregate of previous payments.

The general conditions forming part of the contract provided, *inter alia,* that the work should be done under the general supervision and direction of the architect, that the owner might require the contractor to furnish a bond covering the faithful performance of the contract in such form as the architect might prescribe, that the owner or the architect might make changes by altering or adding to the work the contract sum to be adjusted accordingly, but, except in case of emergencies, no change should be made unless in pursuance of a written order from the architect and no claim to an addition to or deduction from the contract price should be valid unless so ordered. It was further provided that if the contractor should neglect to prosecute the work properly, the owner, after three days' written notice, might make good such deficiencies and deduct the cost from the moneys due or to become due under the contract, provided that the architect approved such action and the amount charged to the contractor. There was further reserved to the owner the right to terminate the contract upon written notice in certain enumerated circumstances and the right to let other contracts in connection with the undertaking of which the work described in the contract should be a part.

Matatall, who apparently had done business with the respondent company for some years in connection with other of his construction operations, arranged with Carl Paulsen, then the respondent's manager at Rocky Mountain House, for the supply of lumber and certain other materials for the work. There was no arrangement made binding either upon the respondent to supply or Matatall to purchase all the materials required, but the evidence is sufficient, in my opinion, to show that both parties contemplated that all the required material of the kind handled by the respondent should be purchased from it.

Deliveries of material were made on the site commencing on April 5, 1949. While payments had been made to Matatall on account of the contract price prior to June 7, 1949, he had not made any payment to the respondent and on that date, at the request of the latter, he gave a written order, directed to the secretary of the School division, directing it to pay all accounts as submitted by the lumber company and to charge the same to his account. On July 5, 1949, Matatall gave a further order in writing, directed to the School Division, authorizing it to pay to the respondent a sum of $8,936.50, stated to be the amount due for the materials supplied by that company for the new school and saying that further deliveries made were to be paid according to statements rendered to the School Division by the lumber company after being approved by Matatall. Pursuant to these orders, payments totalling $8,846.64 were made prior to the date of Matatall's death.

On November 11, 1949, Matatall was killed in an automobile accident. His widow, in her capacity as executrix of his last will, employed a solicitor, Mr. W. J. C. Kirby, to advise her as to what should be done in relation to the construction contract with the School Division, and on November 17th, Mr. Kirby went to Rocky Mountain House and, after discussing the situation with Mr. Stronach, the secretary-treasurer of the School Division, informed the latter that he did not think the estate would be in a position to complete the contract. On the following day, Mr. Kirby wrote to Stronach informing him that he had been instructed by the executrix to say that the estate was not in a position at that time to finance the completion of the school.

The claim of lien filed by the respondent in the Land Titles Office for the North Alberta Land Registration District on December 3, 1949, claimed a lien upon the estate of the Red Deer Construction Co. and the appellant in the land in question in respect of materials which:—

> were furnished (or which materials are to be furnished) for RED DEER CONSTRUCTION CO. and the BOARD OF TRUSTEES OF THE ROCKY MOUNTAIN HOUSE SCHOOL DIST. No. 2590 (sic) on or before the 2nd day of November A.D. 1949. The claimant ceased to furnish materials on the 2nd day of November 1949.

1954

BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. NO. 15 v. ATLAS LUMBER CO.

Locke J.

It is the contention of the appellant that the last delivery of materials pursuant to the arrangement made between Matatall and the respondent was on October 26, 1949, and that as this was more than thirty-five days prior to the date upon which the claim of lien was registered, the lien had ceased to exist prior to the registration of the claim in accordance with the terms of s. 24 of *The Mechanics' Lien Act* (R.S.A. 1942, c. 236).

In the statement of claim delivered in this issue, the respondent claimed that the last material was furnished to the School Division and the Red Deer Construction Company on or about November 22, 1949. Nothing was said in the pleading as to the date which was given as the date of the last delivery in the lien filed having been made by mistake. The justification for the claim that the last delivery was on November 22nd is to be found, if at all, in a delivery of materials made after Matatall's death under the following circumstances: Prior to Matatall's death, he had employed a carpenter named Whaley on this work. On an adjoining property to that upon which the new school was in course of completion, there was an old school building and on November 11th Whaley was doing certain carpenter work there, the exact nature of which became the subject matter of dispute at the trial. When Mr. Kirby had been at Rocky Mountain House, on November 17th, he said that he had asked Whaley for a statement of his wage claim against the estate and he obtained this made up to November 11th. Thereafter, Whaley said that he was employed by the School Division in doing certain carpenter work and on the instructions of the principal and the secretary-treasurer, he ordered material from the respondent amounting to $22.10 for the purpose of doing certain work on their instructions in the old school. Whaley said that from November 12th on he was working for and was thereafter paid by the School Division. As it had been shown that the last previous delivery of material was on October 26, 1949, the learned trial judge, at the conclusion of the argument, dismissed the action on the ground that the claim of lien had been filed too late, as the transaction of November 22nd was an isolated transaction relating to the old school building and had no connection with the contract between the School Division and the Red Deer Construction Company.

Some time later, but before judgment had been entered, upon the application of the present respondent, the hearing was reopened and additional evidence given in an endeavour to show that Whaley had been mistaken in saying that the work he had done after November 11th, for which the material had been delivered on November 22nd, was required, was done in the old school. Both parties were permitted to give further evidence. When recalled, Whaley said that he had been mistaken in saying that the material was required for work done upon the old school, but it had been used for making certain cabinets and also some shelves to go over the radiators. He said that he had done this work on the orders of the Principal of the school and Stronach, the secretary-treasurer and that it had nothing to do with Matatall nor was it part of the Matatall contract. While the evidence of this witness, as to the exact nature of the work in question, is not entirely clear and there is no description of the nature of the cabinets referred to, it is undoubted that it was done on the instructions of the officials of the School Division referred to and the necessary material, on their instructions, purchased on the credit of the School Division. There is no suggestion that this work was either directed to be done or authorized by the architect or that he had anything to do with the matter.

Further evidence given on behalf of the respondent on the continued hearing was given by Mr. Ellenwood who had been the manager of the respondent's yard at Red Deer at the time and who had gone with Mr. Kirby to Rocky Mountain House on November 17, 1949, who said that when they were in the new school building on that day Whaley was working there and had been instructed by Mr. Kirby and Mr. Stronach "to get this lab completed so they could get into it."

Mr. Kirby who had been called for the first time on the continued hearing was not asked as to whether he had given these instructions. Whether the work of completing the laboratory included the making of the cabinets and the shelving to go above the radiators is not shown nor indeed where these articles were to be placed. Whaley, however, had said that the work which he had done after Matatall's death was on the instructions of the officials of the School Division as above stated, a statement which is borne out

1954

BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. NO. 15 v. ATLAS LUMBER CO.

Locke J.

by the fact that he was paid for this work by the Division and that when he went to the lumber yard to order the material on November 22nd, he directed that it be charged to it. The learned trial judge has said that he considered Whaley to be an honest man and accepted his testimony where it was in conflict with that of other witnesses, and I can see no ground for differing from this finding.

The evidence given on behalf of the respondent as to the manner in which the transaction of November 22nd was treated by it requires close examination. Mr. W. S. Heron was the manager of the yard of the respondent at Rocky Mountain House from some time in April, 1949, and it was upon his evidence that the respondent relied to prove its account. Heron, in addition to his other duties, apparently kept the books and, in giving evidence at the first hearing, he said that the respondent's account with the Red Deer Construction Company ran until October 26, 1949. In giving evidence in chief, he produced a number of documents called "yard slips" and these included one made out on November 22, 1949, for material the price of which amounted to $26.55, the slip reading that the material was "sold to R. Mt. House School Div.", and being signed by Whaley who, Heron said, was working for the School Division. This account included materials amounting to $4.45 to be delivered to two other schools and which were not ordered by Whaley, the amounts being entered on the slip after he had signed it. The balance was for the material delivered that day to the school in question. There were also produced and put in evidence at the same time certain ledger sheets showing the Red Deer Construction Company's account with the respondent running back to the year 1946 and the account of the School Division, and it was in the latter account that the material ordered by Whaley and the two amounts delivered to other schools were charged. Heron was unable to explain how it was that in the claim of lien filed, the statement was made that the materials were furnished on or before the second day of November, other than to suggest that it was a mistake made at the head office of the respondent in Calgary where the yard slips and journal pages had been sent for the purpose of making up the claim of lien. He was not recalled when the hearing was continued and further evidence taken. It is common ground that there were no deliveries

on November 2nd, and in the examination for discovery of Mr. J. P. Glaum, an officer of the respondent, it had been admitted that the last delivery prior to that date was October 26th. It is of importance to note that the amount of the lien claimed by the respondent was $7,402.48 and that this amount did not include the sum of $22.10 for the material delivered on November 22nd. It was also stated by the counsel for the respondent at the trial that the School Division had paid for the material delivered on November 22nd.

The learned trial judge, after hearing the further evidence adduced by the parties, delivered written reasons for his judgment dismissing the claim in which the relevant portions of the evidence of Heron to which I have referred are quoted. In the course of these reasons, it was said that the School Division and not Matatall were billed for the material delivered on November 22nd. In delivering the judgment of the Appellate Division, Mr. Justice Frank Ford has said that this was incorrect and that what had happened was that the original delivery slip was made out on that date to the School Division and that:—

> Although set up in the appellant's books as a debit to the School Division another statement bearing the same date was made out to "Red Deer Construction in account with Atlas Lumber Company Ltd". Thus it appears that the item was "billed" to both.

With great respect, I do not think that the evidence supports the latter statement. Heron's uncontradicted evidence makes it quite clear that the material sold on November 22nd on Whaley's order was supplied on the credit of the School Division and the amount was charged to it and not to Matatall. Whaley's evidence makes it equally clear than he was instructed by the officials of the School District to purchase the material and did so, directing Heron to charge the amount to them. Matatall had then been dead for eleven days and Whaley had no authority to order material on his credit even if he had assumed to do so. There appear, however, among the exhibits in this case copies of a number of accounts of the respondent company charged to "Red Deer Construction" commencing on September 4th and continuing to November 22nd, which were put in during the course of Heron's evidence in chief. In answer to a question asked by counsel for the respondent at the trial whether the documents included in

1954

BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. No. 15 v. ATLAS LUMBER CO.

Locke J.

this exhibit, which was marked Exhibit 13, had been sent to the School Division, he said that this was right. Included in Exhibit 13 was a statement dated November 22, 1949, for the items making up the amount of $22.10 made out against "Red Deer Construction". A further account made out against "Red Deer Construction" bearing the dates September 24, 1949, November 22, 1949, shows that an entry on November 22nd of $22.10 was included. No explanation was given by Heron or by anyone else as to how this document came to be made up. It was apparently made, however, not at the time the material was purchased but on or after December 3, 1949, since under that date at the foot of the statement there appears an entry "fee filing lien $5.00." A further matter to be noted is that the balance shown as owing by the Red Deer Construction Company on this statement is $7,424.58, while, as pointed out, the claim of lien was for $22.10 less. There is no proof to be found in this record that these accounts were ever rendered to the Red Deer Construction Company or to Mrs. Matatall as executrix of her husband's estate, and, on the contrary, Heron's evidence proves conclusively that no charge had been made against anyone but the School Division for the amount in question at the time the material was supplied.

The learned trial judge further found upon the evidence that by November 22nd, the contract between Matatall and the School Division had been abandoned. The learned judges of the Appellate Division have disagreed with this finding, holding that the evidence does not show any such abandonment. In the view that I take of the matter and in the circumstances of the present case, I think the point is immaterial. It should, however, be noted that when Mr. Kirby wrote the letter of November 18, 1949, to the School Division, which would no doubt be received before November 22nd, the latter apparently proceeded to treat the contract as being at an end. As to this the evidence of Mr. Stronach, the secretary-treasurer, is clear.

From the date of the receipt of Mr. Kirby's letter, the School Division apparently took charge of the completion of the school. The provision of the agreement which gave the owner the right to terminate the contract upon written notice, was apparently not complied with, the letter from

the solicitor apparently being treated as a refusal to complete and the Division electing to rescind. There is no evidence that the matter of the performance of the further work, either that done by Whaley after November 11th or by other workmen, was authorized in writing by the architect, as provided by the agreement. The only question of law to be determined in the case is as to whether, under these circumstances, the respondent's claim of lien was filed in time.

By *The Mechanics' Lien Act,* a person who furnishes any materials to be used in the construction of any improvement for any owner or contractor has, by virtue thereof, a lien for so much of the price as remains due to him upon the estate or interest of the owner in the improvement, subject in the case of material supplied at the instance of a contractor rather than directly to the owner, to certain limitations. By s. 14 of the Act, the person primarily liable upon a contract by virtue of which a lien may arise, is required to retain for the statutory period 15 per cent of the value of the work actually done where the contract price, as in the present case, exceeds $15,000. The lien is declared to be a charge upon the amount directed by this section to be retained in favour of lienholders whose liens are derived under persons to whom the moneys so required to be retained are respectively payable. The section further provides that all payments up to 85 per cent in a case such as this, made in good faith by the owner to a contractor before notice in writing of the lien is given by the person claiming the lien to the owner, shall operate as a discharge pro tanto of the lien.

By the terms of the contract in this matter, it was provided, however, that 20 per cent of the value of the work should be held back and the evidence of Mr. Stronach on behalf of the School Division shows that this was done. The lien which the respondent was entitled to assert in respect of the material supplied by it on the orders of Matatall up to October 26, 1949, differed materially from that which is was entitled to assert against the School Division in respect of material delivered from November 22, 1949 onward, in that the former claim was subject to the limitations of s. 14, while the latter claim was not.

1954

BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. No. 15 v. ATLAS LUMBER CO.

Locke J.

The respondent's contention to which effect has been given in the judgment of the Appellate Division is that the delivery of November 22nd was not made under a separate contract but, as stated in the reasons:—

> was a delivery under the contract between the owner and the contractor

and accordingly preserved the right of lien. The only authority to which we have been referred in support of this finding is a judgment of Harvey J., as he then was, in *Union Lumber Co.* v. *Porter* (1). In that case, the contractor, after proceeding part way with the contract, abandoned the work and the building was completed by the owner. Prior to the abandonment, material had been supplied to the contractor and afterwards further material was delivered on the directions of the architect. None of the material delivered at the instance of the contractor was furnished within thirty-one days of the time of the filing of the lien, being the statutory period in Alberta at that time. As to this Mr. Justice Harvey said:—

> I think the continuing to supply material keeps the lien alive under the terms of the statute in respect of all material supplied before. If it were otherwise, all a person who wished to get rid of a lien would need to do would be to pay for the last 31 days' work or material, and so cut out the claim for all that was done or supplied before.

Dealing first with the statement made in the second sentence, it could hardly be contended that the lien of a material man supplying material for an improvement at the request of the contractor engaged in performing the work, could be disposed of in this manner. With great respect, however, for the opinion of the late learned Chief Justice of Alberta, I am unable to perceive how this statement bears upon the proposition stated in the first sentence. While the question does not directly arise in the present case, it was decided in *Morris* v. *Tharle* (2), that where there is a general arrangement, even though it be not binding, between a contractor and a supplier of building material for the supply of all the material required for a particular building contract, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides and a lien for all material so supplied is in time, if filed within thirty days of the furnishing of the last item. The reasoning of the Divisional Court in that case was adopted by Killam

(1) (1908) 8 W.L.R. 423. (2) (1893) 24 O.R. 159.

C.J., in *Robock* v. *Peters* (1). In the view of the law as it was stated by Chancellor Boyd in *Morris* v. *Tharle* and adopted by Killam C.J., the lien would not be affected if there were a greater period than the time within which the lien must be registered after the delivery of the last material between deliveries made from time to time as the work progressed. In my opinion, this statement of the law applies to liens arising under *The Mechanics' Lien Act* of Alberta, but as a period of thirty-eight days elapsed from the time the respondent ceased to furnish material under the arrangement made between Matatall and Paulsen, the question does not arise.

The opinion expressed in the first sentence of the quotation raises an entirely different and, in my view, unrelated question. For the conclusion of the learned judge no authority was given. While the arrangement made between Matatall and Paulsen was rather indefinite and the former did not obligate himself to purchase all the required material from the respondent nor agree upon the prices to be paid, I think that, as I have said, the evidence is sufficient to show that both parties contemplated that, as in the case of other earlier contracts, Matatall would order and the respondent company would supply such lumber and other building material of the kind sold by it as was necessary for carrying out the contemplated work. In this respect the position of the respondent is supported by the authorities to which I have above referred. The agreement to be inferred from the conduct of the parties, however, was solely between Matatall and the respondent: there was no privity of contract between the respondent and the School Division and there could accordingly be no claim upon a money count for material supplied under the arrangement with Matatall, the only remedy as against the owner being that provided by *The Mechanics' Lien Act*, if the terms of that statute were complied with. Upon the respondent's own showing, the last delivery made by it under the agreement with Matatall was on October 26, 1949, and within a few days after his death on November 11th it was made clear to the parties that his estate did not propose to continue with the work or complete the contract with the School Division. This fact was recognized by the respondent in supplying

(1) (1900) 13 Man. R. 124 at 136.

1954

BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. No. 15 v. ATLAS LUMBER CO.

Locke J.

all the required material thereafter at the request and on the credit of the School Division without any reference to Matatall's personal representative. The right to a mechanics' lien which accrued to the respondent by virtue of the delivery of the material on November 22nd and thereafter, arose by virtue of the arrangement it made following Matatall's death with the School Division, and in respect of that right a separate lien must have been filed to preserve the respondent's position, in my opinion, had the claim not been extinguished as it was by payment.

I am unable, with respect, to agree with the statement contained in the judgment of the Appellate Division that the delivery of November 22nd was not made under a separate contract but was a delivery under the contract between the owner and the contractor. The evidence, in my opinion, clearly demonstrates the contrary. While it was by virtue of the fact that the School Division had entered into the contract for the erection of the school building with Matatall that the respondent might, by furnishing material at Matatall's request, acquire the statutory right of lien upon the property of the School Division, that fact does not mean that deliveries made under the arrangement made between the respondent and Matatall were deliveries under the contract between the School Division and the latter. To that contract the respondent was a complete stranger. To the agreement made between the School Division and the respondent for the supply of material after Matatall's death, the estate of Matatall was equally a stranger. That the right to a lien which arose by virtue of the supply of material after Matatall's death under these circumstances is distinct from that which was vested in the estate of Matatall appears to me to be clear from a consideration of ss. 6, 13 and 14 of *The Mechanics' Lien Act.*

Further support for the view which I have expressed is to be found in the statement of the law adopted by Lamont J. in *Whitlock* v. *Loney* (1), to which reference is made in the reasons for judgment of the Appellate Division. In that case Lamont J. adopted the following statement taken from 27 Cyc. 114:—

> Where labour or materials are furnished under separate contracts, even though such contracts are between the same persons and relate to the same building or improvement, the contracts cannot be tacked together

(1) (1917) 38 D.L.R. 52.

so as to enlarge the time for filing a lien for what was done or furnished under either, but a lien must be filed for what was done or furnished under each contract within the statutory period after its compliance. Where, however, all the work is done or all the materials are furnished under one entire continuing contract, although at different times, a lien claim or statement filed within the statutory period after the last item was done or finished is sufficient as to all the items; and in order that the contract may be a continuing one within this rule it is not necessary that all the work or materials should be ordered at one time, that the amount of work or materials should be determined at the time of the first order, or that the prices should be then agreed upon, or the time of payment fixed; but a mere general arrangement to furnish labour or materials for a particular building or improvement is sufficient, if complied with, even though the original arrangement was not legally binding.

In effect, what has been attempted in the present case is to tack the right of lien acquired by the respondent under its arrangement with Matatall to that which subsequently arose under its arrangements with the School Division. It may be noted that this statement of the law was adopted by the Appellate Division of Ontario in *Fulton Hardware Co.* v. *Mitchell* (1).

While this is decisive of the matter, in my opinion, it may further be noted that the material delivered on November 22nd was not for the purpose of carrying out work to be done under the contract between the owner and the contractor. According to Whaley, none of this work was specified by the contract. The School Division, apparently electing to treat the contract with Matatall as rescinded and at an end, did not act under its terms and ask the authority of the architect for this work outside the terms of the contract, but clearly undertook the work on its own account. Thus the materials were not supplied nor the work done under the contract.

I would allow this appeal with costs throughout and dismiss the action.

Appeal allowed with costs.

Solicitors for the appellant: *Smith, Clement, Parlee & Whittaker.*

Solicitors for the respondent: *Helman & Barron.*

(1) (1923) 54 O.L.R. 472.