JOHN RITCHIE (PLAINTIFF) ..... APPELLANT;

AND

WILLARD S. JEFFREY (DEFENDANT) ..... RESPONDENT.

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*Oct. 26.
*Nov. 29.

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

Builders and contractors—Materials supplied—Order for money payable under contract—Evidence—Estoppel—Lien—Enforcing equitable assignment—Practice.

A building contractor gave a written order upon the owner directing him to pay the sum of $800 to the plaintiff on account of the price of materials supplied for use in the building which was being erected. The order was presented to the owner and, although not accepted in writing, was held over to await the time for making payments under the contract. The contractor failed to complete the work, and it was finished by the owner at an outlay which left the balance of the contract price insufficient to meet the full amount of the order.

Held, the Chief Justice and Idington J. dissenting, that the order was effective as an assignment of money payable under the contract, but, as there was no evidence of a promise to pay the amount thereof out of the fund, or of facts precluding the owner from denying the sufficiency of what ultimately was payable to the contractor, it could not be enforced against the owner as an equitable assignment.

Per Duff J.—As the equitable relief sought could be granted only upon a consideration of all the circumstances and no claim therefor was made in the courts below nor was the evidence directed to any such claim, the claim came too late on an appeal to the Supreme Court of Canada.

Per Fitzpatrick C.J. and Idington J., dissenting.—As the conduct of the owner respecting the order was equivocal and misleading and induced the materialman to abstain from filing a lien to

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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protect himself, the owner ought to be held liable for the full amount of the order as an equitable assignment.

The appeal from the judgment of the Appellate Division (8 West. W.R. 729) was dismissed with costs.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Ives J., at the trial, and dismissing the plaintiff's action with costs.

The circumstances of the case appear from the head-note.

Lafleur K.C. for the appellant.

Gerald V. Pelton for the respondent.

THE CHIEF JUSTICE (dissenting).—I am satisfied on the evidence that the appellant failed to file a lien under the Act because of the defendant's promise to pay Horn's order. J. W. Ritchie, when examined as a witness, says that he did not file a lien because he trusted Mr. Jeffrey would pay the order given by Mr. Horn and again on his re-examination he testifies as follows:—

Q. Did you actually at any time have any intention of filing a lien against Mr. Jeffrey's property ?

A. We would have, if he hadn't given us the assurance that he was going to pay it.

And again:—

Q. Had you consulted your solicitor about your right to file the lien ?

A. Yes.

The same witness also says that he accomplished the shipment of lumber on that understanding.

(1) 8 West. W.R. 729.

If the appellant had filed his lien he, as material man, under the Act would have been entitled to precedence over Haugen, the sub-contractor, who was subsequently paid $558.10. To say the least, Jeffrey's conduct at the time Horn's order in favour of appellant was presented to him was shifty and ambiguous, and if in the result he led the appellant into error and induced him by his conduct and representations not to file a lien, he should be held liable.

I would allow the appeal with costs.

IDINGTON J. (dissenting).—The only question of any difficulty in this appeal is whether or not the order upon respondent for $800 by Horn, a contractor, engaged in building for him a shop for which, when completed, Horn was to be paid $3,000, can, with the attendant facts and circumstances, be held as furnishing sufficient evidence to maintain the appellant's claim of an equitable assignment of part of the said $3,000.

The shop was being erected in Jasper Park. The appellant furnished lumber therefor to an amount greater than $800, as respondent well knew. Horn, in order to give security to appellant therefor to the amount of $800, gave the following order:—

John Ritchie Lumber Co.,
Edmonton, Alta., Jan. 27, 1914.

W. S. Jeffrey, Esq.,
2005 Jasper W.

Please pay to John Ritchie Lumber Co. the sum of $800 on account of material delivered and shipped to Jasper Park.

C. R. HORN.

This order is not as unambiguously worded as was that in question in the case of *Brice* v. *Bannister* (1).

(1) 3 Q.B.D. 569.

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In that case the order expressly said it was to be "paid out of moneys due or to become due from you to me," and thus within its very terms fulfilled the exact requirements of an equitable assignment.

But we must bear in mind that it is not necessary that such an equitable assignment as in question need to be reduced to writing.

The language of Mr. Justice Chitty in the case of *Brown, Shipley & Co.* v. *Kough*(1), as quoted by Mr. Justice Beck herein, so accurately defines what is required that I think we may accept it, coupled with what Lord Macnaghten said in the case of *Tailby* v. *The Official Receiver*(2), in 1888, as our guide herein.

The quotation I refer to in the former case is as follows:—

> An agreement to pay out of the fund is a good equitable charge. It matters not whether it (the agreement) be to pay an existing debt or a sum of money advanced at the time or whether it (the money to be paid) be (the amount of) a bill of exchange; but it must be shewn on the part of those who assert an equitable charge that they have obtained it (the charge) by agreement. The agreement may be shewn by producing a written document which is clear, or the agreement may be fairly derived from the course of dealing, and, where there is a contest as to an oral agreement, the court must decide whether there is such an oral agreement or not and the plaintiffs have to make out in this case one or other of the things I have mentioned before they can succeed in establishing an agreement amounting to an equitable charge or an equitable assignment of part of the fund. An agreement may be shewn by the terms which the parties came to with reference to the supposed course of dealing and derived also from the course of dealing itself relating to transactions that have been entered into or transactions which it is proposed should be entered into, or it may be shewn by the special terms agreed to at the time when the transaction takes place.

To apply the law as laid down by Mr. James Chitty in this extract we need not go further than consider

(1) 29 Ch. D. 848.

(2) 13 App. Cas. 523.

the course of dealing between the parties. That alone has not been relied upon herein for we have an order and the course of dealing illuminating, as other considerations I am about to advert to, the meaning to be given the order.

It is beyond dispute that the respondent was building a shop in Jasper Park which was being built by Horn, who gives the order; that the appellant had delivered and shipped to Jasper Park material for said building far exceeding in value the amount of the order; that the material so shipped and delivered was at the date of the order being used and ultimately was all used to the knowledge of the respondent by Horn for the purposes of the construction of said building; that respondent knew and recognized such facts and his consequent benefit therefrom and liability upon his contract as the basis upon which Horn proceeded in giving the order; that the "Mechanics' Lien Act" gave him supplying such material to the contractor for such purpose a lien upon the material till used, and upon the building itself when used in the construction thereof, and that in priority to all other liens—unless possibly wage-earners for their labour—and that the parties thereto were entire strangers to each other yet the respondent had no difficulty in understanding why the order was given, and no difficulty in recognizing that it was intended and expected to be paid out of the fund which consisted of the contract price.

The order should be read, if ambiguous, in light of the surrounding facts and circumstances. So read and illuminated thereby, can there be a doubt as to what the order meant and that it did mean that it was to be paid out of the fund in respondent's hands to pay

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for said building and to be a charge thereon and that the fund was to be administered according to the legal rights of the parties concerned in its distribution and that respondent was entitled to discharge *pro tanto* his obligation to Horn by payment of said order? I think not.

To put beyond doubt the knowledge of the respondent I may refer to the following from his own evidence:—

Q. Correct, I know, but the order which was presented to you was an order for the payment of a certain sum of money in connection with the sum of $800 on account of material delivered and shipped to Jasper Park?

A. Yes, that is what the order was for I suppose.

* * * * *

Q. You knew that they were expecting payment from you of the amount of that order?

A. I don't know hardly how to answer that; I presume Mr. Horn had told them that I would pay it without any question.

Q. And you also certainly led them to understand that it would be paid?

A. I told them that it would be paid after the building was done if it was coming to Mr. Horn.

Q. Did you always put in that "If it was coming to Mr. Horn"?

A. I think so, as near as I can remember.

Q. Beg pardon?

A. I think so.

Q. The Court: What I don't understand is why in your dealing Mr. Ritchie should be the only creditor to have to wait or lose if any one was to lose and you pay everybody else?

A. Well, Mr. Horn agreed to furnish all these materials.

Q. But you knew they were coming from Ritchie?

A. I supposed they were, yes; Mr. Horn said he was getting a lot from them; I don't know where the cement and the——

Q. Mr. Grant: You knew that Mr. Ritchie did expect to get the money from you?

A. I know they wanted it from me; they asked me; there is four occasions when they came to me for it.

Q. Now will you answer my question. You knew that Mr. Ritchie expected to get the $800 from you?

A. Why, I suppose he did.

There is much more needless to quote on the same point.

He hedges about paying it by saying he told appellant's agent if that much were coming to Horn when he had completed his contract, he would pay it. As he was under no liability to pay a single dollar till the time had arrived, I cannot see how that helps him. If he had paid no one else till then there would have been no trouble.

If labourers had gone unpaid and, what was highly improbable, their unpaid wages had eaten up the fund in liens therefor the appellant might have been left unpaid. No such thing happened.

A sub-contractor named Haugen got far more than required to pay this appellant. In short, he whose claim was in law and equity subject to be postponed to the claims of the material-men was paid. Respondent quibbles about this being for labour, pretends that at first and later on shews at least as to one item of $500 alone it was for a sub-contract.

The learned trial judge had no difficulty once he arrived at the conclusion that appellant had an equitable assignment then respondent was bound to answer for the whole amount of the order.

And the position taken in the court of appeal proceeds entirely upon the ground that there was no equitable assignment—and indeed only a bill of exchange.

For the reasons already indicated I most respectfully say I cannot accept that view.

It is quite true there is a decision (*Shand* v. *Du Buisson*(1)) that a mere bill of exchange, evidently

(1) L.R. 18 Eq. 283.

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intended as such, is not of itself an equitable assignment, and another that a cheque on a banker cannot be so held. The parties concerned herein never supposed they were dealing with either such thing, but something different.

What we have to pronounce upon herein is not of that simple character in form or intention when we try to understand what the parties were about.

The case of *Percival* v. *Dunn*(1), relied upon below, is clearly distinguishable, for the order was not even addressed to the party who had to pay and was not accompanied, so far as appears, by any attendant circumstances that helped to explain or form an independent arrangement.

The argument presented by counsel here endeavoured to shew that the court in *Brice* v. *Bannister* (2) was divided, but it has ever since stood as good law and been, I venture to think, extended in principle as the equitable doctrine became more familiar to the profession than it was when *Brice* v. *Bannister* (2) was decided, shortly after the "Judicature Act."

The case of *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*(3), though not exactly covering this case, shews how in recent times the court is disposed to treat such claims as rest upon the doctrine relative to equitable assignment.

I agree with the court of appeal that the bargaining between the respondent and the agent of appellant standing alone has little to do with the matter, yet that does not do away with the knowledge the respondent had of the plain purpose of the order to have

(1) 29 Ch. D. 128. (2) 3 Q.B.D. 569.
(3) [1905] A.C. 454.

it paid out of the fund in existence or to come into existence.

I think the appeal should be allowed with costs here and below.

DUFF J.—I have no doubt that the order in question was a good and effective equitable assignment of the fund over which the contractor should ultimately prove to have the power of disposition as between himself and the respondent. To give the appellant the right he now claims, the equitable assignment must be supplemented by something additional, that is by some act or acts of the respondent himself raising a right against him; such, for example, as a promise founded upon legal consideration or conduct precluding the respondent from disputing the existence of an equitable charge for the amount claimed. For such equitable relief no claim was made in the courts below and as such relief could only be granted as the result of an examination of the circumstances as a whole—which it cannot be said the evidence places before us—it is too late now to consider it.

As to promise—the finding at the trial is against it. On the whole I am constrained to the conclusion that the appeal should be dismissed with costs.

ANGLIN J.—Except in so far as he questioned the sufficiency of the order given by Horn to the plaintiff as, under the circumstances, a good equitable assignment, I am in accord with the views expressed by Mr. Justice Beck in delivering the judgment of the Appellate Division. There is nothing in the record which warrants extending the fund upon which that assignment should operate beyond moneys in the defendant's

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hands over which Horn had the right of disposition. The evidence does not warrant a finding of a promise by the defendant to pay upon the order in question more than this amount—and there has been no such finding. Neither does it establish a representation that the fund to which the order attached would be sufficient to meet it, or would amount to any specific sum. It may be that the plaintiff in refraining from registering a mechanic's lien relied upon his equitable assignment and the defendant's acceptance of it, but it has not been shewn that the defendant said or did anything which would warrant an inference by the plaintiff that he had relinquished in his favour his undoubted right to make out of the moneys payable to his contractor such payments as might be necessary to protect his property from liens and to ensure the completion of the building contract and to deduct payments so made from the moneys which would otherwise be payable to the contractor. The plaintiff has failed to make out a case either of a promise to pay the amount of his order or of an equitable estoppel precluding the defendant from denying the sufficiency of the fund in his hands to meet it.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR J.—The defendant Jeffrey was erecting a building and a man named Horn had a contract in connection with that construction. Horn, having purchased materials from the plaintiff Ritchie, gave, on the 27th January, 1914, the following order:—

W. S. Jeffrey, Esq.,
2005 Jasper W.

Please pay to John Ritchie Lumber Co. the sum of $800 on account of material delivered and shipped to Jasper Park.

C. R. HORN.

At the time this order was given and was notified to the respondent no money was due upon the Horn contract by Jeffrey. Horn seems to have been unable to carry out his contract and the proprietor had to pay money to third parties to finish the building. He had to pay some wages of labourers and when the building was finally completed $296.99 remained due to Horn, which he deposited in court for the plaintiff Ritchie.

It is clear from the evidence that the respondent Jeffrey never undertook to pay the full amount of the order. He was willing, however, out of the amount which would ultimately remain owing to Horn on the completion of the contract, to pay that amount to the plaintiff. It would have appeared ridiculous that he would have formally agreed to give an absolute and unconditional promise to pay when he did not know whether Horn would carry out his contract and when some liens could have been registered by wage-earners or others.

The trial judge held that this order constituted an equitable assignment; but it is necessary, in order to constitute such an assignment, that the fund should be specified (*Percival* v. *Dunn* (1)); and, besides, this order was valid subject to any claim under the contract which would have been good against the assignor.

For these reasons the appeal should be dismissed with costs.

Appeal dimissed with costs.

Solicitors for the appellant: *Parlee, Grant, Freeman & Abbott.*

Solicitors for the respondent: *Edwards, Dubuc & Pelton.*

(1) 29 Ch. D. 128.