

1106.

ROADS AND HIGHWAYS—MECHANICS' LIENS—DUTY OF STATE HIGHWAY COMMISSIONER WHEN LIENS PROPERLY FILED AGAINST ROAD CONTRACTORS—SECTIONS 1208 AND 8324 G. C. CONSTRUED—NOT APPLICABLE TO CONTRACTS ENTERED INTO PRIOR TO BUSBY-FOUTS LAW (108 O. L. 478).

1. *Section 1208 G. C. (107 O. L. 126; amended 108 O. L. 487), making applicable to certain contracts of the state the provisions of sections 8324, G. C., et seq., relating to mechanics' liens, is a valid and constitutional enactment, even upon the assumption that it permits a lien-claimant to bring suit directly against the state. Whether such direct action has been authorized, is not herein passed upon.*

2. *By reason of the enactment of said section 1208 G. C. the state highway commissioner must in the administration of his office give heed to the provisions of section 8324 G. C. et seq. He is not required to detain from the principal contractor indefinitely funds sequestered through the filing of the verified statement mentioned in section 8324 G. C., but may in case of conflicting claims or of circumstances tending to delay disposition of the sequestered funds, file action in interpleader.*

3. *The state highway commissioner is personally liable to damages to the lien-claimant if he pays or permits the payment of sequestered moneys direct to the principal contractor after the filing of a proper verified statement (as described in section 8324), and before the obtaining of a release from the lien claimant or through the courts.*

4. *The lien provisions of section 1208 G. C. in their form as appearing in the so-called Busby-Fouts law (108 O. L. 478) do not apply to contracts entered into prior to the becoming effective of said law. The lien provisions of said section in their form as appearing in White-Mulcahy law (107 O. L. 69) apply to contracts entered into subsequent to the becoming effective of that law and prior to the becoming effective of the Busby-Fouts law.*

COLUMBUS, OHIO, March 29, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your communication of recent date has been received, reading as follows:

“Section 1208 (108 Ohio Laws, Part I, page 488) provides for a lien in favor of sub-contractors, material men, laborers and mechanics upon contracts let under the state highway department.

As I understand the law, there is no authority by which a person perfecting such a lien can enforce same, since it will be necessary for him to make the state of Ohio a party defendant. The effect, therefore, under the present law, when such a lien is filed, is to indefinitely tie up the money belonging to contractors, and there would be no limit to the length of time such money would be held.

I desire that you give me your opinion upon my rights and duties under the above section of the statute. Must I withhold this money from the contractors indefinitely? Has the lien statute any validity in law? What if any liability attaches to me should I pay the money direct to the contractor? Will the lien section of the Busby-Fouts bill apply to contracts in force prior to its passage?”

The doubt which you express as to whether the so-called mechanics' lien law

when applied to contracts of the state affords practical relief is quite natural in the light of certain holdings of the courts as summarized in an opinion of this department dated August 25, 1913, directed to state armory board, and appearing in Opinions of Attorney General for 1913, Vol. 1, page 515. The tenor of such holdings and of said opinion of this department is that while the provisions of sections 8324 G. C. et seq. are broad enough in their description of public buildings to include buildings erected by the state, yet such mere description could not be taken as furnishing expressly or by implication any right to a lien on funds accruing in connection with work done on buildings for the state, especially when the provisions in question were read in connection with the rule that the state may not be sued without its consent.

However, the terms of section 1208 G. C. give rise to a situation entirely different than that dealt with in the several holdings and in the opinion above referred to. Said section 1208 as enacted 107 O. L. 126 (White-Mulcahy act) contained, among others, the following provisions:

"The provisions of section 8324 of the general code and the succeeding sections in favor of sub-contractors, material men, laborers and mechanics shall apply to contracts let under the provisions of the preceding sections as fully and to the same extent as in the case of counties."

The language just quoted appears also in section 1208 as enacted 108 O. L. Part I, 487 (Busby-Fouts act) with the following supplemental provision:

"The state highway commissioner shall not be required or authorized, however, to retain out of any estimate any sum in excess of the exact amount of any lien filed, and the remainder of any estimate over and above the amount of such lien shall be promptly paid to the contractor."

So that in contrast to the statutes as they stood when passed upon by the courts and this department as above noted, we now have specific statutory mandate that the terms of section 8324 et seq. shall apply to contracts of the state entered into through the highway department. We are therefore not concerned at this time with the soundness of the decisions and opinion above mentioned.

Before proceeding to consider the practical effect of said section 1208 G. C. in bringing within the provisions of section 8324 et seq. contracts of the state entered into through the state highway department, we may observe that the constitutional validity of said section 1208 is beyond question, even if we go to the length of assuming that said section authorizes suit directly against the state. The doctrine that the state may not be sued without its consent does not have its basis in any constitutional inhibition. The theory underlying that doctrine is well stated in the case of *State ex rel. Parrott vs. Board of Public Works*, 36 O. S. 409, wherein the court say at page 414 of the opinion:

"The doctrine seems to be, that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct.

It is a familiar doctrine, that a state is not affected by the statute of limitations, however general its terms may be. * * * Upon the same principle, it has been held, that a statute providing that 'costs shall follow the event of every action or petition,' does not apply to a party prevailing against the state even in a civil cause. * * * Indeed, the doctrine of the common law expressed in the maxim 'The king is not bound by any statute, if he be not expressly named to be so bound' (*Broom Leg. Max.*

51), applies to states in this country as well. Moreover, upon the same principle rests the well-settled doctrine that a state is not liable to be sued at the instance of a citizen. Not because a citizen may not have a just claim against the state, or may not suffer injury at the hands of the state; but because it must be assumed that the state will ever be ready and willing to act justly toward its citizens in the absence of statutes or the intervention of courts."

No provision of the constitution has been found which prohibits the legislature from enacting a law subjecting the state itself to provisions of laws which otherwise would apply only to citizens.

"The state can, no doubt, through its legislature, subject itself to the provisions of a general law, but it must be by express enactment."

State ex rel. vs. Cappeller, 39 O. S. 207, 213.

Besides, among the amendments to the constitution of Ohio adopted in 1912, is the following, now known as section 33 of Article II of the constitution:

"Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and material men, their just dues by direct lien upon the property, upon which they have bestowed labor or for which they have furnished material. No other provision of the constitution shall impair or limit this power."

Doubtless the primary purpose of this section was to eliminate certain previously existing constitutional objections to a direct lien upon property securing to their full extent the claims of sub-contractors and others; but read literally the section is broad enough to authorize the legislature to provide for liens not only upon funds arising from contracts of the state, but even directly upon the property of the state. Of course, such authority necessarily carries with it authority in the legislature to provide such legal remedies by direct action or otherwise as in its judgment may be appropriate for the enforcement of such lien rights.

The power of the legislature to enact section 1208 being thus very clear the question arises whether the provisions of said sections 8324 et seq. are of such character as to afford a practical remedy to the lien-claimant in respect to the rights given him by said section 1208.

The basic provisions of said sections 8324 et seq., have long been in force in Ohio. When first enacted, the sections authorized liens only upon funds growing out of construction contracts between private individuals. It is only in comparatively recent times that amendments have been inserted authorizing liens on funds growing out of the construction of public buildings and other public construction work. The fact that public officials in the making and carrying out of contracts are greatly restricted as compared with private individuals, has had the result that sections 8324 et seq. are somewhat confusing in their amended form authorizing the inclusion of public enterprises within their terms.

Section 8324 provides, among other things, that sub-contractors, material men and laborers who furnish labor, material, etc., on certain improvements, including road improvements and public buildings, provided for in a contract between the owner or any board, officer or public authority, and a principal contractor, may within a specified time after furnishing the labor or delivering the material, file with the owner, board or officer, or an authorized clerk or agent, a sworn and itemized statement setting forth the amount of labor and material so furnished or delivered, etc.

Section 8325 reads:

"Upon receiving the notice required by the next preceding section, such owner, board or officer or public authority or authorized clerk, agent or attorney thereof, shall detain in the hands all subsequent payments from the principal or sub-contractor to secure such claims and the claims and estimates of other sub-contractors, material men, laborers, mechanics, or persons furnishing materials to or performing labor for any contractor or sub-contractor who intervenes before the next subsequent payment under the contract, or within ten days thereafter."

Sections 8326 and 8327 relate to the filing of a copy of the statement in the office of the county recorder.

Section 8328 relates to the filing of statements with the owner, board or officer by sub-contractors, laborers and material men other than the one who first files.

Section 8329 reads:

The owner, board, officer, or clerk, agent or attorney thereof, upon the receipt of such statement shall, or the lien claimant, his agent or attorney, in the name of such owner, board or officer, may, furnish the principal contractor, or sub-contractor with a copy thereof, within five days after receiving it. If such principal or sub-contractor fails within five days after such receipt by him, to notify, in writing, such owner, board, officer, or clerk, agent or attorney thereof of his intention to dispute such claim, he shall be considered as assenting to its correctness. Thereupon such subsequent payment shall be applied by such owner, his agent or attorney, pro rata, upon such claim, and the amounts, when due, of such claim or estimates as have been meanwhile filed by other sub-contractors, material men, laborers, mechanics or persons furnishing materials, and assented to or adjusted as provided for in this chapter, before the first of such subsequent payments falls due, or within ten days thereafter."

Section 8331 reads:

"If a head contractor or sub-contractor neglects or refuses to pay, within five days after his assent to or adjustment of any claim, the amount thereof, and costs incurred, to the sub-contractor or material men, laborer or mechanic, the owner, board, officer or clerk or agent thereof, when due, shall pay the whole or a pro rata amount thereof as the case may be, as above provided out of payments subsequently falling due. On his failure so to do, within ten days thereafter, the sub-contractor or material man, laborer, mechanic or person furnishing material, when due, may recover against the owner, in an action for money had or received the whole or a pro rata amount, as the case may be, of his claim or estimate, not exceeding in any case the balance due to the principal contractor."

It clearly appears from a mere reading of the several sections just quoted that certain positive duties are cast upon the public board or officer with whom is filed the statement mentioned in section 8324. There is the positive direction in section 8325 that upon the receipt of the statement the board or officer *shall detain* all subsequent payments from the principal or sub-contractor to secure "such claims," meaning, of course, the claims of those who file statements. There is the mandate in section 8329 that if the principal contractor does not give notice within a specified time of his intention to dispute the claim, the subsequent payments *shall be applied* pro rata by the owner upon the claims covered by the statement mentioned in section 8324. Finally, there is the mandate in section 8331 that if the prin-

principal contractor neglects or refuses to pay "within five days after his assent to or adjustment of any claim," the board or officer shall pay *pro rata* the several claims covered by the verified statements.

It may be said here that the action for money had and received provided for in the last sentence of section 8331 is an action against the owner and not against the principal contractor. It goes without saying, of course, that the lien-claimant at any time after the non-payment when due of his account against the principal contractor may bring suit on such account against the principal contractor without reference to the matter of lien—that is to say, that the question whether a sub-contractor, material man or laborer exercises his right to a lien has no bearing whatever upon his right of action against the principal contractor upon the account between them.

The administrative duties imposed upon you as above pointed out do not in the least depend for their validity upon the granting by the legislature of a right of action to the lien-claimant for the enforcement of his rights. Hence, no necessity arises for considering the question whether an effective right of action as against the state has been afforded the lien-claimant.

For the reasons stated, the state highway commissioner is to consider himself as coming within the provisions of sections 8324 et seq. and to be guided by the provisions of those sections and of section 1208 in the event of the filing of an affidavit for lien. Should cases arise wherein conflicting claims or other circumstances either make doubtful or tend to delay unduly the proper disposition of moneys sequestered by the filing of a lien affidavit, you will be at liberty to refer the situation to the courts through the medium of an action in interpleader.

The foregoing observations are sufficient to advise you generally as to your duties in connection with section 1208 and to furnish answer to your first two questions.

Your third question is, what if any liability attaches to you should you pay the money direct to the contractor. The answer is that you are personally liable in damages to the lien-claimant if you pay or permit the payment of the sequestered moneys direct to the contractor after the filing of a proper affidavit, and before the obtaining of a release from the lien-claimant or through the courts.

Your last question is whether the lien section of the Busby-Fouts bill applies to contracts in force prior to its passage. As has already been pointed out, there were provisions for a lien in section 1208 as found in the White-Mulcahy act; so that your question really is whether as to contracts entered into subsequently to the becoming effective of the White-Mulcahy act and prior to the becoming effective of the Busby-Fouts act, the provisions of the former or the latter act apply so far as the lien features are concerned.

You are advised in answer to this question that it has in effect already been passed upon in an opinion of this department found in Opinions of Attorney-General for 1917, Vol. II, page 1231. The following is quoted from that opinion:

"2. Your second question is as follows: Are the provisions of section 1208 G. C., with reference to assignments and liens of sub-contractors, material men, laborers and mechanics applicable to contracts entered into prior to the taking effect of the above bill?

The part of section 1208 G. C. which is applicable to your second question is as follows:

"Nothing herein contained shall be held to prevent the payment, out of any estimate or estimates that may be due, upon the assignment by the contractor to any person who has furnished material for the work, or performed labor thereon of the amount due for such material and labor. The provisions of section 8324 of the General Code and the succeeding sec-

tions in favor of sub-contractors, material men, laborers and mechanics shall apply to contracts let under the provisions of the preceding sections as fully and to the same extent as in the case of counties."

This is also new matter, the same not being found in the law as it stood prior to June 28, 1917.

In answering this question, exactly the same reasoning applies as was used in answering your first question.

Hence, it is my opinion that the provisions of section 1208 G. C., which are applicable to your second question, would not apply to contracts entered into prior to June 28, 1917."

The views just quoted furnish answer to the effect that the lien section (1208 G. C.) of the Busby-Fouts law does not apply to contracts in force prior to the becoming effective of the law. The lien section of the White-Mulcahy law (1208 G. C., 107 O. L. 126) applies to contracts entered into subsequent to the becoming effective of that law and prior to the becoming effective of the Busby-Fouts law.

Respectfully,

JOHN G. PRICE,

Attorney-General.

1107.

SCHOOLS—TAXES AND TAXATION—EFFECT OF VOTE UNDER SECTION 5649-5a G. C. MERELY AUTHORIZES MAKING OF ADDITIONAL LEVIES SUBJECT TO FIFTEEN MILL LIMITATION IMPOSED BY SECTION 5649-5b G. C.—WHERE LEVYING AUTHORITIES FAIL TO MAKE LEVY—NO AUTHORITY TO MAKE SUCH LEVY IN ANY YEAR AFTER EXPIRATION OF PERIOD OF TIME COVERED BY VOTE.

The effect of a vote under section 5649-5a G. C. is merely to authorize the making of additional levies subject to the fifteen mill limitation imposed by section 5649-5b for and during the period of time covered by such vote. Such vote is not in and of itself effective as a levy, and if the levying authorities omit to make the levy in any year within such period no authority is thereby granted to make such levy in any year after the expiration of the period. This is true even though the omission to make the levy is due to the breach of a mere ministerial duty, and no steps had been taken in time to compel the performance of such duty.

COLUMBUS, OHIO, March 29, 1920.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—You have requested the opinion of this department upon the following question:

"A taxing unit voted a two mill levy for five years. The auditor failed to put it on the tax duplicate for the first year and now claims that funds, as a result of this levy, will be available for the remaining four years only. Will the district be deprived of one year's levy from this two mill levy because of the failure of the auditor to place it on the tax duplicate?"

It is assumed that the action described by you was taken under sections 5649-5 et seq. of the General Code, which provide, in part, as follows: