[HIGH COURT OF AUSTRALIA.]

CONCRETE CONSTRUCTIONS PROPRIETARY LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

BARNES . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1938.

SYDNEY, *Dec.* 1, 2, 23.

Latham C.J., Rich, Dixon and McTiernan JJ.

Contractors' Debts—Liability of contractor in respect of material supplied to sub-contractor—Contractors' Debts Act of 1897 (*N.S.W.*) (*No.* 29 *of* 1897), *sec.* 18.

Statute—Consolidating Act—Adoption of construction placed upon Acts consolidated.

Precedent—Overruling decision which has stood for a long period.

Sec. 18 of the *Contractors' Debts Act of* 1897 (N.S.W.) provides that "a contractor who sublets any part of the work shall be responsible to the extent provided for by this Act for the wages of the workmen employed by, and for material, or material and work and labour supplied for the sub-contractor; and a workman employed by, or a tradesman supplying material, or material and work and labour for a sub-contractor, may proceed against the contractor, as in this Act provided, as if he had been directly employed by, or had directly contracted with him."

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ. (*Rich* J. not deciding, on the ground that it was undesirable to upset the long-settled interpretation of the section), that sec. 18 only extends the procedure available under the other provisions of the *Contractors' Debts Act of* 1897 to a case where there is a sub-contractor in addition to a contractor, a contractee, and a workman or tradesman; and does not impose upon a contractor an unrestricted personal liability for the debts of a sub-contractor in respect of wages or materials or

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

work and labour. So *held* notwithstanding that the contrary interpretation had been placed upon the statutory provisions consolidated in the *Contractors' Debts Act of* 1897.

Ex parte Monie, (1883) 4 L.R. (N.S.W.) 138, *Ex parte Johnston*, (1886) 2 W.N. (N.S.W.) 58, and *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan*, (1936) 36 S.R. (N.S.W.) 362; 53 W.N. (N.S.W.) 124, on this point, overruled.

Decision of the Supreme Court of New South Wales (Full Court): *Barnes v. Concrete Constructions Pty. Ltd.*, (1938) 55 W.N. (N.S.W.) 154, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales the plaintiff, William Henry Barnes, claimed from the defendant, Concrete Constructions Pty. Ltd., the sum of £348 0s. 4d.

The declaration set forth that before and at the time of the matters complained of the defendant was constructing certain works at Challis House, Martin Place, Sydney, by virtue of a contract entered into between the defendant and another person, and before and at the time aforesaid had sublet part of such work to a sub-contractor named F. Keller, and thereupon the plaintiff sold and delivered certain materials amounting in all to the sum of £348 0s. 4d. to Keller, who in consideration of that sale and delivery promised to pay for the said materials, all of which materials were used by Keller in performing that part of the work above mentioned which had been sublet to him, and the moneys due for such materials accrued due and payable to the plaintiff not earlier than three months before 23rd December 1937, and neither Keller nor the defendant had paid to the plaintiff the said sum or any part thereof and the same remained wholly due and unpaid.

The defendant demurred to the declaration on the grounds (*a*) that it disclosed no cause of action; (*b*) that it disclosed no contractual or other obligation by the defendant to the plaintiff; and (*c*) that it did not allege that the plaintiff had obtained a certificate under the provisions of the *Contractors' Debts Act of* 1897 (N.S.W.). For a second plea the defendant pleaded that it, before notice that the plaintiff was unpaid, paid all moneys due by it to Keller the sub-contractor.

The plaintiff joined in demurrer and cross-demurred to the defendant's second plea on the grounds (*a*) that it confessed but did not avoid

the cause of action ; and (*b*) that the fact that the defendant, before notice that the plaintiff was unpaid, paid all moneys due by it to Keller, the sub-contractor, was no defence to the cause of action.

The defendant joined in demurrer on the cross-demurrer.

The Full Court of the Supreme Court followed the decision of that court in *Ex parte Road Maintenance and Contracting Co. Ltd.* ; *Re Jordan* (1), which was based upon the decision in *Ex parte Monie* (2), and gave judgment for the plaintiff on the demurrer and on the cross-demurrer : *Barnes* v. *Concrete Constructions Pty. Ltd.* (3).

From that decision the defendant, by leave, appealed to the High Court.

K. A. Ferguson, for the appellant. Apart from sec. 18 thereof the whole scheme of the *Contractors' Debts Act of* 1897 (N.S.W.) is to enable a workman or tradesman to recover moneys which are actually due to the employer or the tradesman's contractee respectively, and no more. The provisions of sec. 18 differ from those of the other sections in that in sec. 18 the defaulting party is the sub-contractor and not the contractor. The other provisions of the Act provide for cases in which there are three parties ; sec. 18 provides for cases in which there are four parties, and, at most, means that an employee or tradesman may sue a contractor direct, without, perhaps, first obtaining a certificate, "to the extent provided for by this Act." Under that section, and having regard to the words "to the extent provided for by this Act," a contractor who sub-contracts is liable for the cost of materials and the wages of his sub-contractor's employees to the extent that a contractor is liable under the earlier provisions of the Act. The liability of the appellant is to pay no more than the extent of the moneys due or accruing due to the sub-contractor. The words, "as in this Act provided," in sec. 18 are words of limitation and really import the provisions of sec. 11, the only difference being that in sec. 18 assignment is not mentioned. In enacting the *Contractors' Debts Act* the legislature adopted the corresponding statute in force in New Zealand. This was done after provisions similar to the provisions in sec. 18 had

(1) (1936) 36 S.R. (N.S.W.) 362 ; 53 W.N. (N.S.W.) 124.

(2) (1883) 4 L.R. (N.S.W.) 138.

(3) (1938) 55 W.N. (N.S.W.) 154.

H. C. OF A. 1938. CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

been judicially interpreted in *Carlisle* v. *Brogden* (1) and *Oakes* v. *Durk* (2). The interpretation there given should be applied to sec. 18 (*Harding* v. *Commissioners of Stamps for Queensland* (3)): See also *Mackay* v. *Davies* (4); *Craies* on *Statute Law*, 4th ed. (1936), p. 159.

[DIXON J. referred to *Barry* v. *City of Melbourne* (5) and *Melbourne Corporation* v. *Barry* (6).]

The position at the date when the *Contractors' Debts Act of* 1897 came into force was that *Ex parte Monie* (7)—where upon a consideration of the section corresponding to sec. 18 the court wrongly decided that the Act created the relationship of master and servant—and *Ex parte Johnston* (8)—where the question was whether in that case there had been a subletting—had been overruled by *Ex parte Thompson* (9). *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (10), in which *Ex parte Monie* (7) was approved, was wrongly decided upon this point.

Windeyer K.C. (with him *Webb* and *S. G. O. Martin*), for the respondent. An important limitation which appeared in the preamble to the earlier *Contractors' Debts Act* and in the New Zealand statute and upon which the decisions by the New Zealand courts were expressly based, was omitted from the preamble to the *Contractors' Debts Act of* 1897 (See *Melbourne Corporation* v. *Barry* (11)). This omission had the effect of making the last-mentioned Act much wider in its application. Sec. 18 introduced new rights; it introduced the principle that a contractor shall be responsible for ensuring that the wages of the employees of a sub-contractor shall be paid to them, and that a supplier of materials to a sub-contractor shall be paid, either by the sub-contractor, or, in default thereof, by himself the contractor. The words "to the extent provided for by this Act" mean to the extent provided in this Act in other cases. The matter has been provided for in sec. 49 (5) of the *Industrial Arbitration Act*

(1) (1874) 1 N.Z. Jur. 169.
(2) (1877) 3 N.Z. Jur. (N.S.) 15.
(3) (1898) A.C. 769, at p. 774.
(4) (1904) 1 C.L.R. 483, at pp. 491, 492.
(5) (1922) V.L.R. 577, at p. 597.
(6) (1922) 31 C.L.R. 174, at pp. 183 et seq.
(7) (1883) 4 L.R. (N.S.W.) 138.
(8) (1886) 2 W.N. (N.S.W.) 58.
(9) (1893) 14 L.R. (N.S.W.) 402; 10 W.N. (N.S.W.) 114.
(10) (1936) 36 S.R. (N.S.W.) 362; 53 W.N. (N.S.W.) 124.
(11) (1922) 31 C.L.R., at p. 185.

1912 (N.S.W.) (See *Miller* v. *Simpson* (1)). *Ex parte Monie* (2) makes it clear that what the Act contemplates is two remedies: (*a*) an ordinary action in which the person concerned may obtain a judgment, and (*b*) a certificate which would enable the person to proceed. This was not interfered with by the decision in *Ex parte Thompson* (3). On the contrary, so far as the right to sue is concerned, *Ex parte Monie* (4) was affirmed in *Ex parte Thompson* (5). Decisions of the courts which have regulated the affairs of the community for many years should not be disturbed (*Hanau* v. *Ehrlich* (6)).

[RICH J. referred to *West Ham Union* v. *Edmonton Union* (7).]

K. A. Ferguson, in reply.

Cur. adv. vult.

Dec. 23.

The following written judgments were delivered:—

LATHAM C.J. The long title of the *Contractors' Debts Act* is: "An Act to consolidate the Acts for better securing the payment of debts due to workmen, tradesmen and others." The object of the Act is to secure payment to workmen for work and labour done, or to tradesmen for material supplied or work and labour done and material supplied, where the person with whom they are in contractual relations does not pay them but where that person is entitled to receive from third persons payment for the work and labour done or the goods supplied.

In the present case the plaintiff Barnes supplied goods to one Keller in respect of which Keller became liable to pay to him the sum of £348 0s. 4d. Keller did not pay. The goods were supplied for the purpose of a sub-contract which Keller had with the defendant company, which was doing work under a building contract made between the company and a building owner. Upon the basis of these facts the plaintiff sued the company for the amount owed to

(1) (1929) A.R. (N.S.W.) 82.
(2) (1883) 4 L.R. (N.S.W.), at p. 141.
(3) (1893) 14 L.R. (N.S.W.) 402; 10 W.N. (N.S.W.) 114.
(4) (1883) 4 L.R. (N.S.W.) 138.
(5) (1893) 14 L.R. (N.S.W.) 402; 10 W.N. (N.S.W.) 114.
(6) (1912) A.C. 39, at pp. 41, 42.
(7) (1908) A.C. 1, at p. 6.

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Latham C.J.

him by Keller. The defendant demurred on the specific grounds that the declaration disclosed no contractual or other obligation by the defendant to the plaintiff and that the declaration did not allege that the plaintiff had obtained a certificate under the *Contractors' Debts Act*. The defendant also pleaded that the defendant, before notice that the plaintiff was unpaid, had paid all moneys due by the defendant to the sub-contractor Keller. The plaintiff cross-demurred to the plea. The Full Court of the Supreme Court gave judgment for the plaintiff on the demurrer and on the cross-demurrer.

The declaration does not allege that the plaintiff and the defendant had any dealings with each other. There was no contract in fact between them. The plea states that the defendant has fully performed the only contract which he made—the contract with Keller. Apart from statute, there could, in such circumstances, be no liability of the defendant to the plaintiff. It is contended by the plaintiff that the *Contractors' Debts Act* imposes an obligation upon the defendant to pay him in full for the material supplied to Keller.

The question which is raised by this appeal is whether the *Contractors' Debts Act* was rightly interpreted in *Ex parte Monie* (1)—a case decided in 1883, and followed in *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (2) (*Davidson* J. dissenting) and in the present case. In those cases it has been held that a workman, employed by a sub-contractor who has failed to pay him his wages, may recover his wages by a direct action against the contractor, who is next in the chain to the sub-contractor, without taking any proceedings against the sub-contractor and without going beyond the contractor to a building owner or other persons. Claims by workmen to wages are limited by the Act to sixty days' wages. There is no corresponding limitation in the case of claims for material supplied or for work and labour done and material supplied. If the decisions mentioned are right, the contractor may, without any limitation at all as to amount, be compelled to pay any supplier of material to the sub-contractor even though he has already fully paid the sub-contractor. The present case relates to the supply of material.

(1) (1883) 4 L.R. (N.S.W.) 138.
(2) (1936) 36 S.R. (N.S.W.) 362; 53 W.N. (N.S.W.) 124.

The Act (1879) originally applied only to claims by workmen for wages. It was extended in 1888 to include claims by tradesmen for material supplied and work and labour done and material supplied. It will be convenient, in discussing the Act, to speak of workmen, except in the case of secs. 4 and 5, which apply only to work and labour, and sec. 6, which applies only to material and to material and work and labour done.

Sec. 3 of the Act provides for the issue of a certificate to a workman which will enable him, after establishing the liability of his employer (the contractor) to pay him wages, to recover his wages from a third person (the contractee) with whom his employer has made a contract of which the work of the workman is part, or to which it is incidental. The initial words of sec. 3 are: "If in any proceeding at law in any court of competent jurisdiction, any sum is found due and payable by the defendant for work and labour . . . done . . . by the plaintiff." The basis of the scheme of the Act is that a competent court finds that a sum is in fact due and owing by a defendant to a plaintiff in a proceeding at law in a court of competent jurisdiction. The proceeding may be by summons or plaint (sec. 14) and the condition of any further proceedings against the third person is that the plaintiff obtains judgment against the defendant (sec. 16). This section provides that in the event of the plaintiff obtaining judgment he shall proceed by notice in the form of the third schedule. That notice is a notice that a certificate has been issued to him in accordance with the terms of sec. 3. The "proceeding at law" mentioned in sec. 3 is not a proceeding under the Act. It is a proceeding under a contract which is enforceable by reason of the common law or some statute other than the Act. The Act does not provide for this proceeding at law. It assumes that proceeding, and then provides for a proceeding which depends upon the granting of a certificate which may be used against a third person.

When the workman has obtained judgment against his employer for wages he may apply to the judge or justice for a certificate in the form of the second schedule (sec. 3). This certificate states that in pursuance of the Act the judge or magistrate certifies that a specified sum was found to be due and payable by the defendant (employer)

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Latham C.J.

to the plaintiff (workman) for work and labour done. The certificate does not refer to any third person, and the issue of the certificate does not impose any liability upon any third person. No proof of any liability of the third person is required before the certificate may be issued. Up to this stage there is only an ordinary proceeding to recover wages in a competent court. The plaintiff obviously has to prove his case in the ordinary way. If he suspects that his employer may not be able to pay him and believes that he may be able to obtain payment by utilizing the provisions of the Act he may obtain a certificate, but he is not required to offer any evidence affecting any person other than his employer—the contractor.

If the defendant employer is a contractor who is entitled to payment for the work done under a contract with a third person the remaining provisions of the Act became applicable. The workman may obtain from his employer (who is the defendant and the contractor) a certificate in the form of the sixth schedule (sec. 17). This section provides that where a certificate has been granted "against" a contractor the contractor shall on demand furnish to the workman a certificate which certifies that a specified person is the contractee of the work upon which the workman is employed. This certificate does not impose any liability whatever upon the contractee, who has not yet been heard. The contractee is the third person to whom reference has already been made. Sec. 7 provides that if the work done is work which is part of or incidental to work for the doing of which moneys may be due or accruing due to the defendant (that is, the employer), in the Act denominated the contractor, under an express or implied contract with any third person, the plaintiff (the workman) may obtain payment of the sum mentioned in the certificate out of such moneys by serving on the third person (called the contractee) a notice in the form of the third schedule together with a copy of the certificate. The third schedule gives the contractee notice that the work done by the workman (in respect of which he has already recovered judgment against the contractor) has been done in performance of an agreement entered into with the contractee by the contractor, and it requires the contractee to pay the amount specified in the certificate "out of any moneys now due or from time to time becoming due" from the

contractee to the contractor under the said agreement (sec. 7 and third schedule). The notice further informs the contractee that on his failing to pay the money on demand he will under the Act be liable to legal proceedings at the suit of the workman to obtain judgment.

Three persons are now concerned: (*a*) the workman, who is an employee of the contractor and who is a plaintiff who has established his claim for wages against the contractor; (*b*) the contractor, who has employed the workman, has failed to pay him his wages, has had judgment given against him, and who is bound by a contract with the contractee by reason of which contract the work has been done; (*c*) the contractee—a third person who made the contract with the contractor by reason of which the contractor procured the work to be done by the workman.

The effect of serving the notice and the copy of the certificate is specified in sec. 8. Upon such service all moneys "due or to accrue due as aforesaid from the contractee to the contractor to the amount of the workman's or tradesman's debt specified in the certificate shall be deemed to be effectually assigned by the contractor to such workman or tradesman" subject to any prior assignment which was binding at the time of service. The statute, therefore, operates to make a statutory assignment of such moneys, namely, "moneys due or to accrue due" to the contractor to the amount specified. If there are no such moneys due or to accrue due no obligation of any kind is imposed upon the contractee.

Sec. 11 is the provision which enables a workman to enforce the obligation which, in the circumstances stated, the Act imposes upon the contractee. It provides that "if the contractee fails to pay as aforesaid, the workman or tradesman may sue for and recover in his own name the moneys assigned as aforesaid as if the assignment of the debt due to the contractor were valid at law." There is an express provision in sec. 11 that the contractee shall have the benefit of any defence which would have been available against the contractor, except any defence which is founded upon an act of the contractee after service of the notice and copy certificate. It is clear that under this provision the liability of the contractee to the workman is limited by his liability to the contractor. If no moneys

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Latham C.J.

are due or to accrue due from the contractee there is no liability which the workman can enforce.

There are certain further limitations affecting the liability of the contractee. They appear in secs. 4, 5 and 6. Sec. 4 provides that a certificate is not to be given if the workman could have a lien upon a movable chattel in respect of his wages. Sec. 5 limits the amount recoverable by a workman by means of the certificate to sixty days' wages. Sec. 6 requires that proceedings under the Act in respect of material or of material and work and labour shall be instituted within three months after the debt accrued due to the tradesman.

Thus the Act provides a quite clear and intelligible system which enables a workman to recover from a third person who owes money to his employer the amount of the wages which his employer fails to pay him where it is shown that the third person owes or will owe money to the employer by reason of the work done by the workman. The provisions (except those mentioned in secs. 4, 5 and 6) apply equally to workmen and to tradesmen.

Hitherto only three persons have been under consideration; the workman, the contractor (his employer) and the contractee. Sec. 18 is an obscure section which raises the difficulties with which the court has to deal upon this appeal. It introduces a fourth person—a sub-contractor. It is in the following terms: "A contractor who sublets any part of the work shall be responsible to the extent provided for by this Act for the wages of the workmen employed by, and for material, or material and work and labour supplied for the sub-contractor; and a workman employed by, or a tradesman supplying material, or material and work and labour for a sub-contractor, may proceed against the contractor, as in this Act provided, as if he had been directly employed by, or had directly contracted with him." Sec. 18 is intended to make the other provisions of the Act applicable in a case or cases in which otherwise those provisions would not, or might not, be applicable. It is divided into two parts. The first part imposes responsibility "to the extent provided for by this Act." The second part entitles a workman or a tradesman to proceed "as in this Act provided." Thus the object of the section is to make the other provisions of the

Act, whatever they may be, applicable in the case or cases which are identified or defined by the other words of the section. Thus the form and construction of this section are suited to the extension of the other provisions of the Act to a specific set of circumstances, not to the enactment of a new provision which would operate independently of the rest of the Act.

As already stated, in *Ex parte Monie* (1) and in *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (2), it was held that sec. 18 entitles a workman to recover judgment directly against a contractor for wages due to him by a sub-contractor as well as to obtain a certificate against a fourth person as contractee. It was held that the final words of the section entitle the workman to proceed against the contractor as if the contractor were his employer for all the purposes of the Act, though not for the purpose of other Acts such as, for example, the *Masters and Servants Act*—as to which see *Ex parte Thompson* (3). The result is that the contractor can be compelled to pay as if he was the defaulting sub-contractor, and that it is immaterial that he has already paid the sub-contractor. A contrary view was taken in New Zealand in the cases of *Carlisle* v. *Brogden* (4) and *Oakes* v. *Durk* (5).

These decisions in New South Wales appear to me to give no proper effect to the words " to the extent provided for by this Act " or to the words " as in this Act provided." It appears to me to be evident that the responsibility created by the section is a responsibility limited as to extent by other provisions of the Act, and that the right to proceed against a contractor which is given by the section is a right to use, in a case where there are four persons in the legal chain, a procedure provided by the other provisions of the Act. But the decisions in question do not accept all the limitations of responsibility imposed by the Act, and they interpret the section as conferring a right to proceed against the contractor as if the other provisions of the Act did not exist and without any regard to them.

The section contemplates (*a*) a workman or tradesman, (*b*) a sub-contractor, (*c*) a contractor, (*d*) another person (called a " third

(1) (1883) 4 L.R. (N.S.W.) 138.
(2) (1936) 36 S.R. (N.S.W.) 362; 53 W.N. (N.S.W.) 124.
(3) (1893) 14 L.R. (N.S.W.) 402; 10 W.N. (N.S.W.) 114.
(4) (1874) 1 N.Z. Jur. 169.
(5) (1877) 3 N.Z. Jur. (N.S.) 15.

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Latham C.J.

person " in sec. 7) in the position of a building owner, with whom the contractor has made a contract.

In my opinion it is clear enough that the other provisions of the Act would enable the workman to secure payment from the contractor, because he could sue the sub-contractor as his employer and, after obtaining judgment, obtain a certificate and serve it upon the contractor who, as a contractee under the prior provisions of the Act, would thereupon become bound to pay the workman out of the moneys due or to accrue due by him to the sub-contractor. It may therefore be argued that the object of sec. 18 cannot be merely to impose a liability under the Act upon the contractor—the prior provisions of the Act having already accomplished that object. But it must be recognized that difficulties might have arisen in the case of four persons unless a provision like sec. 18 had been included in the statute. It might have been argued that the Act applied only to cases where three persons were concerned, and there might have been uncertainty as to whether the workman was entitled to obtain a remedy against a person who was in fact a contractor but who, in order to be made liable under a certificate, would have to be treated as a contractee. Further, it might have been argued that a sub-contractor could not be a contractor within the meaning of the Act. Upon this view a reason appears for the inclusion of the first part of sec. 18.

The first part of sec. 18 makes a contractor responsible for the wages of the workman employed by a sub-contractor " to the extent provided for by this Act," that is, as I have suggested, by the provisions of the Act other than sec. 18. Those provisions do not create any liability between an employer and a workman whom he employs. The liability of the employer to pay wages depends upon a contract which is enforceable at common law or possibly under the *Industrial Arbitration Act* or possibly under the *Masters and Servants Act*. The only responsibility which the Act creates and to which the first part of sec. 18 can refer is a responsibility to pay upon a certificate. That is the responsibility which is imposed upon a contractor under the first part of sec. 18. The responsibility is a responsibility " to the extent provided for by this Act." These words introduce, in the case of wages, first the exclusion of liability where there could have

been a lien (sec. 4), secondly the sixty days limitation (sec. 5). In my opinion they also introduce the third limitation created by or referred to in secs. 7, 8, 9 and 11, namely, the limitation in amount of the liability of a person who is treated as a contractee to the amount of moneys which are due or to accrue due from the contractee to the contractor—that is, in the case of sec. 18, to the person there called the sub-contractor. It is difficult to suggest any reason, based upon the words of the first part of sec. 18, why the two former limitations should be included and the third excluded. Indeed, the words must, I think, be interpreted as including all the limitations, or none. If they include none, they become meaningless. Thus, to sum up, the first part of sec. 18 prevents a contractor arguing that he cannot be treated as a contractee because he is a contractor, and it also excludes any contention that a sub-contractor is not a contractor within the meaning of the Act. Further, the words " to the extent provided for by this Act " introduce all the limitations to which I have already referred.

The second part of sec. 18 provides that the workman or tradesman " may proceed against the contractor, as in this Act provided, as if he had been directly employed by or had directly contracted with him." This part of the section is complementary to the first part. The first part declares the responsibility of the contractor where there are a head contractor, a contractor, a sub-contractor and a workman. The responsibility of the contractor is limited in extent by the Act. But this provision only takes the workman as far as the contractor —not as far as the head contractor. It would be possible to argue that, when he had obtained a certificate against the contractor, he had exhausted the remedies of the Act, because there could not be a certificate upon a certificate. The Act provides only for a certificate upon and after a judgment (sec. 3). How then could provision be made to enable a workman to reach a head contractor if both a contractor and a sub-contractor defaulted ? If the scheme of the Act were to be preserved, the only answer could be that provision must be made to enable the workman to get, not merely a certificate against the contractor, but some judgment against the contractor upon which a certificate against the head contractor can be based. This is what sec. 18 accomplishes. It first makes it clear that,

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Latham C.J.

where there is a sub-contractor, a contractor can be made responsible for wages, but only to the extent provided for in the Act. When that responsibility has been declared, viz., by a certificate, the second part of the section then comes into operation. That responsibility is to be regarded as if it were a responsibility arising from a direct contract between the workman and the contractor. If there had been such a direct contract, the contractor could have been sued upon the contract, and if judgment were obtained, a certificate (limited as to amount by all the provisions of the Act as well as by the amount of the judgment) could have been granted against the person with whom the contractor had contracted—the contractee. Thus the second part of sec. 18 provides the machinery which makes it possible for a workman to obtain a certificate against a head contractor.

The workman cannot skip any link in the legal chain. He cannot ignore his employer, the sub-contractor, and, without giving him an opportunity to raise any defence to the claim for wages, simply sue the contractor. He must first sue the sub-contractor. If he gets judgment for say £20 for wages against him, he may obtain a certificate for £20. He may then serve the prescribed notice and a copy certificate upon the contractor. If the contractor owes the sub-contractor only £15, then the contractor becomes liable to pay the workman £15, subject to defences which he may have against the sub-contractor (sec. 11). If the contractor pays, or so far as he pays, the workman, there is an end of the matter. But so far as he fails to pay what he ought to have paid, the workman is given, by sec. 18, an opportunity of recovering against the head contractor. That section first declares the responsibility (to the extent provided for by the Act) of the contractor to the workman. In the absence of defences allowable under sec. 11 that responsibility is a responsibility to pay him a sum of £15 as for wages. The second part of the section then enables the workman to proceed against the contractor as in the Act provided as if he had been directly employed by him. The creation of the right to proceed is complementary to the responsibility already created by the section. It provides a means of using or relying upon that responsibility " as in this Act provided." Thus, in the example taken, the workman may " proceed against "

the contractor as if he had been directly employed by him and may obtain a judgment against him for £15, representing a responsibility for wages declared by the section. The requirements of sec. 3 are then satisfied. After obtaining this judgment he may then under the provisions of the Act obtain a certificate and use it against the head contractor, who will thereupon, subject to defences available to him against the contractor, become liable to pay the workman £15, if he, the head contractor, owes that amount to the contractor in relation to the work done (sec. 7).

Thus sec. 18 extends the scheme of the Act, with all its obviously just limitations as to the extent of vicarious liability, to cases where four persons are concerned.

The view adopted in *Ex parte Monie* (1) not only does not, as I think, give sufficient effect to the terms of the section, but it produces very unjust results. Attention has already been called to the fact that it compels a contractor to pay a workman or supplier of goods even though, without any misconduct on his part, he has already fully paid the sub-contractor who employed the workman or bought the goods. But further, the contractor has no means whatever of protecting himself against such a consequence. No statement made to him by the sub-contractor can protect him: Compare *Industrial Arbitration Act* 1912 (N.S.W.), sec. 49 (5) (inserted by Act No. 16 of 1918, sec. 16), where, in a section imposing a vicarious liability for wages, it is provided that a statement in writing that there are no wages owing is a complete protection. Again, the application of the decision in *Ex parte Monie* (1) produces strange discriminations between workmen and tradesmen who deal with a contractor and those who deal with a sub-contractor. The former have a remedy against a third person only to the extent to which that person may owe money to the contractor, and then only subject to defences available to the third person against the contractor, for example, set-off. But the workmen or tradesmen employed by or supplying goods to a sub-contractor are (according to *Ex parte Monie* (1)) not so limited. The fact that the sub-contractor has been fully paid or that the contractor has a set-off against him is immaterial in their case. No reason can be suggested for such a distinction. Finally,

(1) (1883) 4 L.R. (N.S.W.) 138.

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Latham C.J.

if the second part of sec. 18 is regarded as imposing a substantive liability, independent of the other provisions of the Act, as upon a direct contract of employment or of sale of goods, still more remarkable results follow. If the contractor is to be treated as if he had actually made such a contract, he becomes liable upon the contract itself. If the goods sold are to be taken in instalments, he would become liable to receive and pay for future instalments. He would be liable for any breach of the contract. If part of the consideration for the supply of the goods consisted in the rendering of services by the sub-contractor, then the contractor would be bound to provide those services or to pay damages for not doing so. All these considerations support the conclusion which I have reached that sec. 18 does not do any more than extend the other provisions of the Act to a case where there is a sub-contractor in addition to a head contractor, a contractor and a workman or tradesman.

The result is that I find myself unable to agree in the view taken by the majority of the Full Court.

But it is argued for the respondent that even if this court should be of opinion that the decision in *Ex parte Monie* (1) was wrong, the court is not at liberty to act upon such an opinion. The *Contractors' Debts Act* was re-enacted in 1897 and it is urged that the legislature must be taken to have adopted the construction placed upon the Act of 1879 by *Ex parte Monie* (1) in 1883 : See the cases cited in *Halsbury's Laws of England*, 1st ed., vol. 27, p. 142, including *Greaves* v. *Tofield* (2), where *James* L.J. said : " The safe and well-known rule of construction is to assume that the legislature when using well-known words upon which there have been well-known decisions uses those words in the sense which the decisions have attached to them."

This argument has made me hesitate in reaching the conclusion which I have stated. But there are, in my opinion, circumstances which make it proper to reject the argument in the present case. In the first place, the judgments in *Ex parte Monie* (1) are not supported by any detailed reasoning based upon the terms of the section in question. No reference whatever is made to the words " to the extent provided for by this Act." Further, the significance and

(1) (1883) 4 L.R. (N.S.W.) 138.

(2) (1880) 14 Ch. D. 563, at p. 571.

effect of the decision is by no means apparent from the case itself. The case was not one in which a tradesman sued for the price of material supplied. It was a case of a workman suing for wages. There is nothing to show that the court realized, or to support the inference that Parliament understood, that the decision meant that a contractor could be made liable, to an unlimited amount, for goods found to have been supplied to a sub-contractor; that this liability could be established against the contractor without the establishment of any liability against the sub-contractor—who alone, apart from the tradesman, would in many cases know whether the goods had been supplied or not; and that it was immaterial that the contractor had already paid the sub-contractor. Thus *Ex parte Monie* (1) cannot be regarded as a fully reasoned decision. I refer to the dissenting judgment of *Davidson* J. in *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (2) and to the statement of *Jordan* C.J. in the same case (3) expressing doubt as to the meaning of sec. 18.

In view of the difficulty of discovering a reasoned basis for the decision in *Ex parte Monie* (1) and of the fact that the court did not contemplate the effect of the decision in cases relating to the supply of materials, I am of opinion that it is the duty of this court to declare the meaning of the Act as it sees it, and not to act upon the assumption that Parliament has adopted as the law the consequences which would flow from following the decision in the present case.

In my opinion the appeal should be allowed. There should be judgment for the defendant upon the demurrer and upon the cross-demurrer.

RICH J. The appeal should be dismissed.

The section now under consideration was, as it then stood, interpreted in *Ex parte Monie* (1) and *Ex parte Johnston* (4). In *Ex parte Thompson* (5) *Windeyer* J., as he then was, explained the meaning of the judgment of the then Chief Justice Sir *James Martin* in

(1) (1883) 4 L.R. (N.S.W.) 138.
(2) (1936) 36 S.R. (N.S.W.), at pp. 375, 376.
(3) (1936) 36 S.R. (N.S.W.), at p. 370; 53 W.N (N.S.W.), at p. 126.
(4) (1886) 2 W.N. (N.S.W.) 58.
(5) (1893) 14 L.R. (N.S.W.), at p. 405; 10 W.N. (N.S.W.), at p. 115.

H. C. OF A. 1938. CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES. Rich J.

Ex parte Monie (1). The first two decisions were given more than fifty years ago and have been acquiesced in ever since, although the Act was amended in 1888 and consolidated in 1897. In the instant case the Supreme Court has in *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (2) adhered to the decision in *Ex parte Monie* (3). Neither the judge of the Supreme Court who dissented in *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (4) nor my colleagues appear to agree upon one single interpretation of the section complete in all its parts and involving no diversity of application, although the substantial result of the interpretation adopted by the majority in this court may be the same. I shall refrain from publishing any infallible nostrum for arriving at its interpretation. I shall not adopt the role of a prophet, *Davus sum non Oedipus*. In the circumstances and amid such a diversity of opinions it cannot be said that the original interpretation is "manifestly erroneous" (*Lancashire and Yorkshire Railway Co.* v. *Bury Corporation* (5)), or "plainly wrong" (*West Ham Union* v. *Edmonton Union* (6)). It is, therefore, I think, undesirable to upset an interpretation which has been settled so long that people may be supposed to have acted according to it for a considerable time and on the strength of which many transactions may have been adjusted and rights determined (*West Ham Union* v. *Edmonton Union* (7)). In this case at any rate I decline to be an iconoclast.

In my opinion the appeal should be dismissed with costs.

DIXON J. Sec. 18 of the *Contractors' Debts Act of* 1897 has received an interpretation by which it imposes upon a contractor a direct liability to the workmen employed by a sub-contractor and to the tradesmen who supply him with material. The liability to a workman is for the payment of wages for a period not exceeding sixty days in all. The liability to a tradesman is for material supplied or for work and labour done and material provided, limited, as I understand, to the indebtedness of the sub-contractor accruing due

(1) (1883) 4 L.R. (N.S.W.), at p. 142.
(2) (1936) 36 S.R. (N.S.W.) 362.
(3) (1883) 4 L.R. (N.S.W.) 138.
(4) (1936) 36 S.R. (N.S.W.), at pp. 372 et seq.
(5) (1889) 14 App. Cas. 417, at p. 419.
(6) (1908) A.C., at p. 5.
(7) (1908) A.C., at pp. 4, 8.

within three months of the institution of the proceedings for its recovery from the contractor.

The question we have to decide is whether this interpretation should stand.

Sec. 18 of the Act is a special provision dealing with the liabilities of sub-contractors to workmen and tradesmen, that is to say, with cases in which there is an owner or other person letting a contract, a contractor who in turn sublets a contract to a sub-contractor, and a workman or tradesman of the sub-contractor whom he fails to pay.

The general provisions of the Act relate to the liabilities of a contractor and refer to three persons, the workman or tradesman, the contractor, and a third person with whom he contracts, called by the Act the contractee. These general provisions do not say that the contractee shall be the owner or other person or body for whom the works or building contracted for are constructed or erected. It is not stated that he must stand in any special relation to the works and it is compatible with the terms of the provisions that he may himself be an intermediate contractor and not a building or constructing owner. But, if in this way a fourth party happens to exist, the general provisions of the Act ignore the fact and deal only with the mutual relations of three parties; while sec. 18 in terms contemplates the existence of four and applies only in such a case.

The general provisions of the Act provide a means whereby workmen employed by a contractor and tradesmen supplying him with material may have recourse to the moneys accrued or accruing due to him under the contract for the purpose of obtaining payment of unpaid wages, or of the unpaid price of the material supplied.

The statute is based on a New Zealand enactment of 1871, and the provisions when first adopted in New South Wales by the *Contractors' Debts Act* 1879 (42 Vict. No. 22) were limited to workmen. Tradesmen were included by an amendment made ten years later (52 Vict. No. 3).

The plan of the general provisions may be described briefly. They enable the workman or tradesman to obtain from a court before which in proceedings at law a sum is found to be due to him by the contractor for work and labour done or materials provided,

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Dixon J.

a certificate certifying the debt and stating that the work was done or the materials provided for a particular building or work of construction. If the work done or the material provided be the whole or part of or incidental to work or material for which any moneys may be due to the defendant, that is, the contractor, from a third person, that is, the contractee, the workman or tradesman who is plaintiff in the proceedings may serve upon the third person the certificate together with a notice that, inasmuch as the work or material specified in the certificate has been done or provided in performance of an agreement entered into with the third person by the contractor who has failed to pay the workman or tradesman giving the notice, the third person is required under the Act to pay the latter on demand the amount specified in the certificate out of any moneys due or from time to time becoming due. Thereupon such moneys up to the amount of the certificate are to be deemed to be assigned to the workman or tradesman, and until the debt is discharged the contractee is bound to satisfy it out of such moneys as they become due to the contractor by paying the workman or tradesman upon his application. If the contractee fails to do so the workman or tradesman may sue for and recover in his own name the moneys so assigned as if the assignment were valid at law by any proceeding which the contractor might have taken, subject, however, to any defences on the part of the contractee, except defences founded on some act of his own done after service of the notice. Two limitations of time are imposed, one which stood in the original Act for workmen, and the other, which was added, for tradesmen. A certificate cannot be given for more than sixty days' wages, and a proceeding under the Act by a tradesman must be instituted within three months after the debt to him becomes due. There is a provision governing priorities and some incidental provisions, one only of which need be mentioned. It is one which enables the workman or tradesman when he sues the contractor to serve, by the court's leave, a notice upon the contractee which has the effect of binding moneys accruing due from the contractee to the contractor and attaching them in the former's hands pending the plaintiff's obtaining judgment against the contractor and a certificate.

Two special provisions of sec. 18 are added to this scheme. It is sufficiently evident that the purpose of adding them was to give to the workman employed by a sub-contractor and a tradesman who supplies him with goods some remedy the operation of which would be, so to speak, higher up than or behind the sub-contractor with whom the workman or tradesman is in immediate privity. But the section is so obscurely expressed that much difficulty has been experienced in saying whether, on the one hand, the remedy is confined to moneys due or accruing due under one or other of the contracts and, if so, whether it is the head contract, or whether, on the other hand, a full personal liability is imposed upon the contractor. Sec. 18 is as follows : " A contractor who sublets any part of the work shall be responsible to the extent provided for by this Act for the wages of the workmen employed by, and for material, or material and work and labour supplied for the sub-contractor ; and a workman employed by, or a tradesman supplying material, or material and work and labour for a sub-contractor, may proceed against the contractor, as in this Act provided, as if he had been directly employed by, or had directly contracted with him."

No other provision is contained in the Act as to the responsibility of a contractor for the wages of a sub-contractor's workmen or for his indebtedness to a tradesman. The Act does not provide for " the extent " of that responsibility, nor how a workman of a sub-contractor or a tradesman supplying him with material may proceed against the contractor. It is, therefore, clear that the expressions " to the extent provided for by this Act " and " as in this Act provided " refer to provisions made, not for the case of a contractor and a workman or tradesman or a sub-contractor, but for some other case. It is necessary, in other words, to understand after the expression " to the extent provided for by this Act " some such words as " in the case of," &c., and to understand the like words after the expression " as in this Act provided." But the difficulty is to say in the case of what. The choice lies, I think, between two possibilities only. One is to supply the words " in the case of a contractee." The other is to supply the words " in the case of a workman employed by a contractor or tradesman supplying him with material." If the first is adopted, the earlier part of the

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Dixon J.

section means that the contractor who has sublet part of the work shall be under a responsibility to the workmen and tradesmen employed by or dealing with the sub-contractor to the same extent as the responsibility under which a contractee is placed to a contractor's workmen and tradesmen. It would mean that the contractor, on service upon him of a certificate, would be liable to the extent of moneys due or accruing due to the sub-contractor. Considering still the first part of the section alone, no objection could be raised to this meaning except that it attributes to it no greater purpose or operation than that of making an express provision for the case of a sub-contractor, a case which might be comprehended under the general provisions of the Act if the intermediate contractor were regarded in relation to the sub-contractor as a contractee. In *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (1), the decision followed by the Supreme Court in the present case, *Jordan* C.J. said that this suggested meaning would be satisfactory but for the fact that it gives no force to the concluding words "as if he had been directly employed by or had directly contracted with him." Turning to the second part of the section in which the phrase causing this difficulty occurs, it will be seen that if the words understood are "in the case of a contractee" the later part of the section authorizes the sub-contractor's workman or tradesman to proceed against the contractor, as in the Act provided in the case of a contractee, as if he had been directly employed by or had directly contracted with him. The proceedings provided by the Act for the case of a contractee are by serving a certificate upon him and suing as assignee. Does it necessarily follow that no effect can be given to the words "as if he had been directly employed by or had directly contracted with him"? If these words are understood as giving the workman or tradesman a new and independent right or benefit it is, I think, possible to give them an effect not altogether unsatisfactory. They may be read as meaning that, having served his certificate upon the contractor, the workman or tradesman may proceed to enforce the liability thus arising as if he were a servant or in contractual privity with him. This would mean that he could sue on common money counts in courts competent to entertain such

(1) (1936) 36 S.R. (N.S.W.) 362; 53 W.N. (N.S.W.) 124.

causes of action ; that is to say, a workman could sue for work and labour done and invoke among other jurisdictions that created by the *Masters and Servants Act*, and the tradesman could sue for goods sold and delivered in any competent court.

So much for the considerations upon which the suggestion turns that the section imports the analogy of the contractee. The alternative, as it appears to me, is to imply or understand some such words as " in the case of workmen and tradesmen directly employed by the contractor or contracting with him." Upon this understanding of the text, the earlier part of the section must refer to the extent of the additional remedies given to a workman or tradesman for enforcing the ordinary contractual liabilities of the contractor employing him or obtaining goods from him. That liability existed independently of the Act and, as the last section in the Act is careful to say, no remedy for its enforcement is to be prejudiced. The extent to which the Act provides for the responsibility of a contractor as a debtor in respect of the wages of his workmen and of the material supplied to him by tradesmen is by adding the remedy by certificate and notice creating a statutory assignment of moneys payable by the contractee and the remedy by notice amounting to a stop order or attachment pending the obtaining of a certificate. Accordingly, on this footing, the earlier part of the section might be taken to mean that out of moneys payable by the building owner or contractee to the contractor the sub-contractor's workmen and tradesmen should be paid what the sub-contractor owed them, that is, on obtaining a certificate and giving notice. But, upon the same footing, it would be more difficult to interpret the second part of the Act as exposing the contractor to no personal liability. For it uses the words " proceed against the contractor." If he is to be proceeded against as if he were the direct employer of the workman or purchaser of the goods, it would mean a personal responsibility. On the other hand, the words " as in this Act provided " may be treated as restrictive words, restricting the remedy to proceedings for a certificate. This I understand to be the basis of the dissenting judgment of *Davidson* J. in *Ex parte Road Maintenance and Contracting Co. Ltd.* ; *Re Jordan* (1). His Honour was led to the conclusion

(1) (1936) 36 S.R. (N.S.W.), at p. 374.

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

Dixon J.

that, upon the true construction of the language used, it was only intended to permit a worker employed by a sub-contractor to sue the contractor for the purpose of obtaining a certificate as to the balance due for wages, so that he might use it to procure an assignment *pro tanto* of any debt due either to the contractor by his original contractee, or due by the contractor to the sub-contractor."

The difficulty in this view is that the Act provides for no independent proceedings for a certificate. It simply authorizes or requires a court to grant a certificate to the plaintiff in proceedings instituted and maintained at law quite independently of the Act. Further, if it does mean that the moneys payable by the contractee to the contractor may be intercepted to answer a debt of the sub-contractor to his workman or tradesman, and so intercepted whether the contractor has or has not paid the sub-contractor in full, it is difficult to see why it should stop short of imposing a personal liability upon him. *Jordan* C.J. took the words "to the extent provided" to refer to the limit imposed upon the amount of wages for which a certificate might be granted, viz., sixty days' wages. After examining several suggested meanings of the section, his Honour expressed his conclusion as follows:—"The present section . . . seems to be intended to impose some form of personal liability on a contractor, who is merely a contractee for the purposes of the earlier sections. I think that what the Act means is that the contractor shall be responsible to the extent of not exceeding sixty days' wages for the wages of the workmen employed by a sub-contractor on the job the subject of the contract, that a workman employed by a sub-contractor may proceed against the contractor to enforce this responsibility, and that he may, if he chooses, in such proceeding obtain not only judgment against the contractor, but a certificate enabling him to garnishee summarily moneys payable by the contractee to the contractor, in the same way as if the contractor were his actual employer. This was, I think, the view taken of the section by the Full Court fifty years ago in the cases of *Ex parte Monie* (1) and *Ex parte Johnston* (2). In *Ex parte Thompson* (3) it was held, not that the workman could not recover from the contractor, but

(1) (1883) 4 L.R. (N.S.W.) 138.
(2) (1886) 2 W.N. (N.S.W.) 58.
(3) (1893) 14 L.R. (N.S.W.) 402; 10 W.N. (N.S.W.) 114.

that the section did not create an actual relationship of master and servant between the contractor and the workman, such as would expose the former to the drastic remedies of the *Masters and Servants Act*. The Act has been consolidated since these decisions were given ; and I can see no reason for not following them " (1).

The three authorities to which *Jordan* C.J. refers are, in my opinion, very unsatisfactory decisions ; but I agree that their effect is as his Honour states it. They are unsatisfactory because in neither *Ex parte Monie* (2) nor in *Ex parte Johnston* (3) is there any reported examination or explanation of the text of the statute, nor is there any reference to two decisions which had been given upon the New Zealand model (*Carlisle* v. *Brogden* (4) and *Oakes* v. *Durk* (5)) in both of which the contractor's liability was limited to the moneys owing by him to the sub-contractor. Further, the actual conclusion in both *Ex parte Monie* (2) and in *Ex parte Johnston* (3) was, in *Ex parte Thompson* (6), admitted to be wrong.

But the question for us is whether, at this date, we are prepared to place some other and, if so, what interpretation upon the provision.

For myself, if the question were untouched by decision, I should feel no difficulty in preferring the construction which I first indicated. That construction would give to the section no greater effect than an express provision making it clear that the workmen and tradesmen of a sub-contractor might, by means of a certificate, obtain what was owing to them from moneys accruing due to the sub-contractor from the contractor in the same way as under the general provisions the workmen and tradesmen of a contractor might obtain what he owed them from the moneys payable to him by the building or constructing owner or contractor. I do not deny that it is a construction which involves some difficulties, but it is open to far less objection than other interpretations, and I believe that it represents the true meaning of the legislature. The interpretation resulting from *Monie's Case* (2) and *Ex parte Johnston* (3) appears to me to work injustice, and finding, as I do, that *Latham* C.J. and *McTiernan* J. have arrived

(1) (1936) 36 S.R. (N.S.W.), at pp. 369, 370 ; 53 W.N. (N.S.W.), at p. 126.
(2) (1883) 4 L.R. (N.S.W.) 138.
(3) (1886) 2 W.N. (N.S.W.) 58.
(4) (1874) 1 N.Z. Jur. 169.
(5) (1877) 3 N.Z. Jur. (N.S.) 15.
(6) (1893) 14 L.R. (N.S.W.) 402 ; 10 W.N. (N.S.W.) 114.

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

at the same conclusion as to the effect of the provision I think that we should place our own interpretation upon it.

For these reasons the appeal should be allowed.

McTIERNAN J. In endeavouring to discover the construction of sec. 18 of the *Contractors' Debts Act of* 1897 it is necessary to attend both to the language of the section and its connection with the other sections of the Act. By its language it imposes a responsibility on a contractor for the debts owing by a sub-contractor to workmen and tradesmen and gives a right to a workman or tradesman to whom a sub-contractor is indebted to proceed against the contractor. For the extent of the responsibility thereby imposed and the nature of the proceeding which the workman or tradesman may take against the contractor the section refers to the other sections of the Act. The section states that the contractor shall be responsible for the sub-contractor's debts to workmen or tradesmen "to the extent provided for by this Act" and that the workman or tradesman "may proceed against the contractor, as in this Act provided, as if he had been directly employed by, or had directly contracted with him."

Now, the Act does not in terms provide any extent to which a contractor is to be responsible for the payment of a sub-contractor's debts for labour or materials. But I think that what the section intends is to impose a responsibility on the contractor for such debts and to assimilate it to the responsibility which the Act as a whole imposes on a contractee for the debts due by a contractor to workmen and tradesmen. It follows that every provision of the Act which limits or conditions the responsibility of the contractee for such debts limits or conditions the responsibility imposed on the contractor for the debts owing by the sub-contractor to workmen and tradesmen. It is clear that the responsibility of the contractor for such debts is not intended to exceed what would be the measure of his responsibility if he were a contractee and the debts were those of the contractor. One of the limitations of the contractee's responsibility is that, where he has paid to a contractor all moneys due and accruing due to the contractor, he is not then responsible for the contractor's debts owing to workmen and tradesmen. In that case there would be no fund in the contractee's hands which, by operation of the Act,

would be assigned to the workmen or tradesmen. It follows that, if the contractor has paid the sub-contractor all moneys due and accruing due to that party, the contractor is outside the operation of the Act.

The second part of sec. 18 gives to a workman or tradesman a right which is correlative to the responsibility imposed on the contractor by the first part of the section. It seems to me that when, and only when, there are moneys due and accruing due from the contractor to the sub-contractor, the workman or tradesman to whom the sub-contractor is indebted for labour or material, as the case may be, "may proceed against the contractor, as in this Act provided, as if he had been directly employed by, or had directly contracted with him." The right given to the workman or tradesman is limited by the words, "as in this Act provided," and it is made to depend on the statutory fiction that there is privity of contract between the contractor and the workman or tradesman to whom the sub-contractor is indebted.

The Act, by sec. 3, provides that the workman or tradesman who seeks a statutory assignment under it in order to secure the payment of debts due to him by a contractor should, in the first place, sue the contractor at law and in such a proceeding obtain a certificate in the form provided by the Act for the amount found to be due and payable to him, the amount for which the certificate may be given being subject to special limitations in the Act. The words, "as in this Act provided," refer to, amongst other procedural provisions mentioned in the Act, the mode of proceeding set forth in sec. 3. But as there is no privity at common law between the contractor and the workman or tradesman, to whom the sub-contractor is indebted, the section creates such privity by introducing the fiction of direct contractual relationship so as to enable the workman or tradesman to take proceedings at law against the contractor. The words creating the privity, if read apart from their context, are capable of meaning that the contractual relationship thus created is as complete as if the parties were bound by a contract of their own making. But these words are part merely of the sentence comprising sec. 18 and must be considered in relation to the provision of the whole section. Accordingly, the contractual right created in the

H. C. OF A. 1938.

CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES.

McTiernan J.

workman or tradesman by these words establishing the privity does not exceed the limits of the correlative responsibility imposed on the contractor by the first part of the section. The measure of the contractor's responsibility, which may be enforced in proceedings founded on the statutory contractual relationship, is limited by the first part of the section. The responsibility is imposed on the contractor "to the extent provided for by this Act," and the judgment which may be recovered against him and the certificate which may be given by the court in such proceedings cannot exceed the measure of that responsibility. Where, according to the intendment of the Act, there is no responsibility on the contractor, there is no right in the workman or tradesman to proceed against him. It follows, on the one hand, that the workman or tradesman cannot proceed against the contractor if the contractor has paid all moneys due or accruing due to the sub-contractor; and, on the other hand, that if the contractor has not paid moneys due or accruing due to the sub-contractor the workman or tradesman to whom the sub-contractor is indebted may obtain, in respect of the sub-contractor's debt to him, a judgment against the contractor (in an amount not exceeding the moneys due or accruing due to the sub-contractor and within the other limits of the Act) under which he may exercise all the rights available to a judgment creditor at law; he may, in addition, obtain a certificate for the amount of the judgment which, if he has not obtained satisfaction of his debt, will entitle him to exercise the special statutory remedy of securing an assignment of moneys due or accruing due to the contractor from the contractee.

Although under this construction the contractor has a personal liability *sub modo* for the debts payable by the sub-contractor to workmen and tradesmen, he is not on that account subject to any greater financial burden than that which is consequential upon the obligations assumed by him at common law to the sub-contractor. I apprehend that, if he were compelled under the statute to pay the workmen or tradesmen what was due to them by the sub-contractor, his indebtedness to the sub-contractor under his contract with him would be *pro tanto* discharged. Both the workmen and tradesmen to whom a contractor is indebted would, under this construction, have substantially the same remedies. The primary object of the

Act is to enable those creditors to get at the funds in the hands of the proprietor of the work, the contractee, who in the ordinary course of business would find the money to be expended on the job. The fiction that there is a direct contractual relationship between the contractor and such workmen and tradesmen as are actually creditors of the sub-contractor is introduced to effectuate that object. The fiction must not be construed as conferring rights beyond those necessary for this purpose (*Hill* v. *East and West India Dock Co.* (1), per Earl *Cairns*). It enables those workmen and tradesmen to sue the contractor to enforce his limited statutory responsibility to them and to get a certificate under sec. 3, which is essential to set the machinery of the Act in motion. Thus, against the contractor personally both sets of creditors have the same kind of remedy, although in the case of those who are actual creditors of the sub-contractor and only statutory creditors of the contractor, their claim must be limited, as has been explained, to the extent to which the Act makes the contractor responsible for their debts. In addition, both sets of creditors have precisely the same remedy, initiated by way of certificate, to have the contractor's debts due to him by the contractee compulsorily assigned to the extent necessary to satisfy their own claims.

The difference between this construction and that which the majority of the Supreme Court placed on sec. 18 in *Ex parte Road Maintenance and Contracting Co. Ltd.* (2) is to be found in the effect given to the phrase, "to the extent provided for by this Act." In my opinion, the construction which prevailed in that case unduly narrows the scope of that phrase. The phrase, according to its natural and ordinary meaning, makes it necessary to subject the responsibility imposed on a contractor by sec. 18 to all the limitations and conditions which the other sections of the Act impose on a contractee's responsibility for the debts of the contractor. The judgment of the majority in the above-mentioned case accepts one only of such limitations, the limitation of the amount of wages which a workman may recover, as provided by sec. 5, and omits others, as,

(1) (1884) 9 App. Cas. 448, at pp. 455, 456.

(2) (1936) 36 S.R. (N.S.W.) 362; 53 W.N. (N.S.W.) 124.

H. C. OF A. 1938. CONCRETE CONSTRUCTIONS PTY. LTD. v. BARNES. McTiernan J.

for example, the limitation implicit in sec. 8, which confines a contractee's responsibility to cases where money is due or accruing due to a contractor. By giving the words, "to the extent provided for by this Act," their complete and, as I think, natural operation, the contractor's responsibility under the section is limited to the same extent as the contractee's responsibility under the Act, and the section, under that construction, provides a remedy for workmen and tradesmen to whom a sub-contractor is indebted which is in harmony with the rest of the Act. This construction avoids the discrimination which results from restricting the scope of the phrase as in the construction adopted by the majority in *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (1). Under that construction the workmen and tradesmen to whom a sub-contractor owes moneys for labour or materials get a kind of remedy which is not available to the workmen and tradesmen to whom a contractor is indebted, the former being thereby enabled to obtain payment of their debts from the contractor, although he has already discharged all his obligations to the sub-contractor.

It was contended, on behalf of the respondent, that the construction adopted by the Full Court should not be departed from because it was given in the case of *Ex parte Monie* (2) and was adhered to in the cases of *Ex parte Johnston* (3) and *Ex parte Thompson* (4), and has the support also of parliamentary acquiescence. It is true that, since the construction was first given, Parliament amended the Act and later consolidated it without making any change in the language of the provisions construed by the court. In my opinion, these last-mentioned cases did not clearly expound the limits of the section. They leave a fundamental difficulty which *Jordan* C.J. referred to in *Ex parte Road Maintenance and Contracting Co. Ltd.*; *Re Jordan* (5). He said: "As to the way in which the statutory responsibility created by sec. 18 may be enforced in such a case as the present, it is not easy to express a confident opinion in view of the looseness of the language used." It is a matter of doubt what are the limits of the construction in which it is said Parliament acquiesced. In any

(1) (1936) 36 S.R. (N.S.W.) 362; 53 W.N. (N.S.W.) 124.
(2) (1883) 4 L.R. (N.S.W.) 138.
(3) (1886) 2 W.N. (N.S.W.) 58.
(4) (1893) 14 L.R. (N.S.W.) 402; W.N. (N.S.W.) 114.
(5) (1936) 36 S.R. (N.S.W.), at p. 370; 53 W.N. (N.S.W.), at p. 126.

case, the court is not bound to uphold the construction which was put on the section, although it has stood for a number of years, if the court is clearly of opinion that the construction does not express the intention of the legislature (*Lancashire and Yorkshire Railway Co.* v. *Bury Corporation* (1)). With great respect to the eminent judges of the Supreme Court who construed these provisions in *Ex parte Monie* (2), I do not think that the construction there laid down, as I understand it, is one which is warranted by the language of sec. 18.

Upon the record in this case there is a plea which says that, before notice that the respondent was unpaid, the appellant paid all moneys due by it to the sub-contractor. For the reasons given, this plea is, in my opinion, a good answer to the respondent's declaration, which purports to be based on sec. 18. The appeal should be allowed and judgment given for the appellant on the demurrer book.

Appeal allowed with costs. Order of Supreme Court discharged. Judgment for defendant with costs upon demurrer and upon cross-demurrer.

Solicitors for the appellant, *Baldick, Asprey & Co.*
Solicitors for the respondent, *Martin & Lamport.*

J. B.

(1) (1889) 14 App. Cas. 417.

(2) (1883) 4 L.R. (N.S.W.) 138.