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*May 22.
*June 24.

HENRY L. DAY (PLAINTIFF) ....APPELLANT;

AND

THE CROWN GRAIN COMPANY AND W. S. CLEVELAND (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Mechanics' lien—Completion of contract—Time for filing claim—Construction of statute—R.S.M., 1902, c. 110, ss. 20 and 36—Right of appeal.

The time limited for the registration of claims for liens by sec. 20 of "The Mechanics' and Wage Earners' Lien Act," R.S.M., 1902, ch. 110, does not commence to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder.

The judgment apealed from (16 Man. R. 366) was reversed. Davies and Maclennan JJ. dissented on the ground that the evidence was too unsatisfactory to justify an extension of the time.

The court refused to quash the appeal on the ground that the right of appeal had been taken away by sec. 36 of the statute above referred to.

APPEAL from the judgment of the Court of King's Bench for Manitoba(1), reversing the judgment of His Lordship Mr. Justice Richards, at the trial, and dismissing the plaintiff's action with costs.

The action was brought against both defendants, respondents, and was maintained with costs by the judge at the trial, who decided that the plaintiff was entitled to a lien on the property in question for the

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 16 Man. R. 366.

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sum of $2,140.60, claimed for materials supplied and work done under his contract for the installation of certain machinery in an elevator in the Town of St. Boniface, in Manitoba. The defendant Cleveland did not appeal from this judgment, but, on an appeal by the company, the judgment at the trial was reversed and the action dismissed with costs. The issues on the present appeal were, therefore, confined to the claim against the company.

On the appeal coming on for hearing, *Galt,* for the respondents, moved to quash the appeal on the ground that, under section 36 of "The Mechanics' and Wage Earners' Lien Act"(2), there could be no appeal from the judgment in question. Without calling upon the appellant's counsel to reply, the court ordered the argument to proceed upon the merits of the appeal.

The circumstances of the case and the questions raised upon this appeal are stated in the judgment of the majority of the court, delivered by His Lordship Mr. Justice Idington.

C. P. Wilson and *A. E. Hoskin* for the appellant.

Alex. C. Galt for the respondents.

THE CHIEF JUSTICE concurred in the opinion of Mr. Justice Idington.

DAVIES J. (dissenting).—For the reasons given by the court below, I am of opinion that this appeal should be dismissed.

(2) R.S.M., 1902, ch. 110.

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Davies J.

I do not think the time fixed by statute within which proceedings must be taken to enforce a mechanics' lien, should be extended on evidence so unsatisfactory as that here offered. I fully agree in the appreciation given by the Court of Appeal to that evidence, that the plaintiff himself treated the contract as completed on the 20th of April, 1904, and also as to the reason for Burn's intention to return.

The argument failed entirely to satisfy me that he intended to return with any idea of completing a contract he had already, in the view of both parties, practically and substantially completed.

IDINGTON J.—The defendant Cleveland contracted with his co-defendants to build, in Winnipeg, a grain elevator.

It was specified in their contract that a complete dust collecting system was to be installed therein.

The system adopted was one in which at least two kinds of contrivances, known as Day's patented dust collectors and Day's patented furnace feeders, of which the appellant was the patentee, were to be used.

The appellant agreed with Cleveland to do the work and supply the material for that part of his contract with respondents which involved the complete system of dust collecting that was to be installed.

The respondents had nothing to do with this sub-contract beyond approving the system or being satisfied with its execution. It was well known to them that the sub-contract was made, and, no doubt also known, that it was necessary for their contractor Cleveland to obtain this patented machinery from appellant, yet no attention was paid by the company to the Mechanics' Lien Act.

If companies or others disregard the plain and obviously proper provisions of this statute, they should not set up, as is done here, a wail about losing money thereby.

The questions for us are: Did the appellant become entitled by virtue of the said Act to a lien upon the respondent company's property for the amount of work and material covered by this sub-contract? And if so,—Has he lost it by reason of failure to register within thirty days from the completion of such sub-contract?

The lien was registered on the 30th of June, 1904. It is not denied that the work was done, or, alternatively, that the work would have been done by appellant but for the action of respondents.

It is claimed the lien was not registered in time. That depends on whether the work was completed on the 19th April, 1904, or not.

The appellant's work on that date was all done save some parts which would not cost very much to do and which could have been done in a few hours had the rest of the work Cleveland had to do been ready to receive these parts in their proper place.

Appellant's foreman arranged with the man in charge for Cleveland that he, the appellant's foreman, would do these things at a later date; that he would return for the purposes of seeing the machinery he had placed work properly and give satisfaction, and then could and would supply all the minor things in question.

He then went home to Minneapolis, the domicile of appellant also, and on the 20th April, having reported the state of his work to appellant's book-keeper, the whole contract was charged up as if finished. The

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completion having been delayed by Cleveland, the appellant was entitled to look to him for a substantial payment having only received about one-third of his contract price.

On the 2nd of June, without instructions from anybody, the book-keeper wrote a letter to the respondent company's manager calling attention to this and stating that letters on the same subject to Cleveland remained unanswered and that the work was completed.

This letter does not seem to have been answered.

The respondents now lay stress upon the facts of this charging up the contract price and writing this letter and they say that, coupled with statements made by appellants' foreman before leaving Winnipeg in April to the effect that he was "through" and was taking his tools and material away, there can be no doubt but that the appellants' men supposed the work all completed and that, in fact, it must be inferred therefrom that it was completed on the 19th April.

This seems to have been relied upon in the court below.

It appears to me an unwarranted conclusion when we find it as conclusively proven, as anything can be proven, by Clapp, the superintending foreman in charge of the work for Cleveland, when appellant's men left in April, that this foreman of appellant was to return and finish as already stated.

Counsel for respondents on the argument before us would not venture to cast the slightest doubt on the honesty of Clapp and admitted he had no interest in the matter. How then, as I asked, could his story be impeached or affected by the circumstances already referred to?

I have not heard any answer to this. I cannot conceive any effective answer possible. The bookkeeper, being human, erred. No claim, resting on such obvious error, can stand. It led to giving an appearance of truth to the ground relied upon by respondents. It was, however, I fear, merely an appearance of truth.

The test question here is whether or not the appellant could in law have sued on the 20th of April and recovered from Cleveland as for a completed contract. I am of opinion he could not. Trifling as the parts unfinished were, the party paying, in such a case, was entitled to insist on the utmost fulfilment of the contract and to have these parts so supplied that the machine would do its work.

We must not overlook the nature of the work to be done and the possibility of the slightest departure from the true way to construct rendering it worthless.

I am not surprised to learn that workmen doing this class of work desire as well for their own reputation as for the purpose of satisfying their patrons that they should see it running, and running in good order, before considering it completed.

Obviously the machine was absolutely useless without some of the parts that remained to be attached thereto, and another part of it so defective as to be liable to burn the buildings down and leave the appellant, in that event, if he had so handed it over, liable to an action.

Apply these tests, and the cases relied on below have no application here.

Truly the things in question do look trifling; so does the most of patented machinery to the wise people that see it working.

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Idington J.

I am abundantly satisfied that if we had been hearing the converse of this case, on the facts it presents, in an action begun by appellant, in April, when the work was charged up in the books, we would have been told by respondents that a clearer case of an unfinished contract could not be found.

I fear interest blinds the apprehension.

I think the appeal should be allowed with costs, and the judgment of the learned trial judge restored, with costs of court below.

MACLENNAN J. (dissenting).—I agree in the opinion of my brother Davies.

DUFF J. concurred with Idington J.

Appeal allowed with costs.

Solicitors for the appellant: *Campbell, Pitblado, Hoskin & Grundy.*

Solicitors for the respondents: *Tupper, Galt, Tupper, Minty & McTavish.*