

of 80 per cent of the value of the materials and labour done on the 10th of each month, as the work progresses, and the remainder when the work is all complete, and after the expiration of 30 days.

The Berlin R. & C. Co. set out on affidavit: The work began under the contract in April, it was found necessary to order certain extras, and about August 1st, the McNeill Co. found themselves in financial difficulties and unable to pay their workmen; work on the building almost ceased; the workmen being unable to get their pay refused to work longer. Thereupon the Berlin R. & C. Co. took possession of the work themselves, and it is probable they will have to complete the building by day labour. The estimated value of the McNeill Company's work and materials is \$4,111 and 80 per cent. of that has been paid to the McNeill Co. The Berlin R. & C. Co. say it will be impossible to ascertain at the present time what will be the cost of completing the work—and that it will be impossible to ascertain what amount, if any, is justly and lawfully due until the completion of the building.

The plaintiffs having delivered their statement of claim, the defendants, the Berlin R. & C. Co., applied on affidavit setting out the above as the facts, for an order staying the action.

The Deputy Judge of the County Court in Chambers made an order staying the action as against the Berlin R. & C. Co. until the completion of the building, reserving leave to the plaintiffs to apply, if at any time it should appear to them that the company was not proceeding with the building with due diligence and reserving the question of costs.

The plaintiffs now appeal.

I am of opinion that the order cannot stand.

The learned Deputy Judge is said to have proceeded upon the ground that the plaintiffs can recover from the Berlin R. & C. Co. only the amount which on the completion of the building is due from that company to the McNeill Company. But there are two answers to such an argument:

(1) Such a question of law should not be determined in Chambers on an interlocutory application, and I do not intend to determine it now. It should either be set down for argument as a question of law arising on the pleadings under Consolidated Rule 259—or preferably determined by the Judge at the trial. In either case the question can be made the subject of appeal in the regular way.