

except the same be made as a security for the purchase price, and interest thereon, of seed grain. Maxwell on Statutes, p. 661; *Ex parte Charing Cross, etc., Bank*, 16 Ch. D. 35; *In re Rolfe*, 19 Ch. D. 98; and *Hamilton v. Chair*, 7 Q.B.D. 319, followed.

Judgment for plaintiff against Todd on the covenant in the mortgage for payment of the money, with costs, and dismissing the action as against Armstrong, but without costs.

Daly, K.C., and *Meighen*, for plaintiff. *Aikins*, K.C., and *Taylor*, for defendant Armstrong.

Dubuc, J.]

MCARTHUR v. MARTINSON.

[Feb. 2.

Mechanic's lien—Reserve of percentage of contract price—Payments to material men and wage earners out of the reserve—Liability of owner for full amount of reserve.

The defendant Martinson entered into a contract with the owners to erect for them a building for the sum of \$17,164. Before the building was quite completed Martinson abandoned the contract, but the owners had kept back fifteen per cent. of the amounts called for by the progress estimates made from time to time. They, however, made payments, both before and after Martinson abandoned the contract, to wage earners and other parties entitled to file liens, and they claimed in this suit, which was brought to enforce the plaintiff's lien for lumber supplied to Martinson for use in the building, that they were entitled to deduct such payments from the fifteen per cent. required by s. 9 of the Mechanics' and Wage Earners' Liens Act, R.S.M. 1902, c. 110, to be held back and were only liable to account to the plaintiff and other lien holders for the balance, relying on s. 10 of the Act.

Sec. 10 in effect provides that if an owner chooses to make any such payments he may do so on giving three days' notice of such payments to the contractor, and that such payments shall be deemed to be payments to the contractor on his contract generally, "but not so as to affect the percentage to be retained by the owner, as provided for in s. 9."

Held, that this clearly means that no such payments can be made out of the percentage required to be resumed under s. 9, and that the defendants, the owners, were liable in this action for the full fifteen per cent. of the value of the work done up to the time Martinson abandoned the work.

C. P. Wilson and *Frank Fisher*, for plaintiff. *Daly*, K.C., and *Crichton*, for defendants.