

MECHANICS' LIENS.

before notice in writing of a lien of a sub-contractor. Section 2 in effect says that the remaining ten per cent. cannot be paid even though no notice of lien be given by a sub-contractor, until ten days have elapsed from the completion of the work. In other words, for those ten days the lien of the sub-contractor is preserved as against the owner, and no payment made of the ten per cent. within that period can be set up as against any sub-contractor notifying the owner of his lien within that period. But that is a very different thing from saying that the ten per centum is liable to answer the claims of the sub-contractor in any event, even though it has never been earned by the contractor. Such a view of the statute would amount to a practical repeal of the equitable provision contained in section 6 of the original Act, to which we have referred.

The price on which the ten per centum is to be reserved we should have supposed must be the whole contract price. The statute is framed on the assumption that the contract is completed. The case of a contract being only partially performed is not apparently within the contemplation of the Act. Assuming that the contract is completed, there is no difficulty in determining what the statute means. It is when there has been a breach of contract by the contractor, and the ten per cent. has not been earned by him, that the difficulty arises.

To meet such a case it has been argued that the 41 Vict. c. 7, s. 2, requires that the owner should always keep back ten per cent. of the price of the work from time to time actually completed, and this view we see has been recently adopted in *re Cornish*, by the Divisional Court of the Chancery Division. The Court was not, however, unanimous in opinion, PROUDFOOT, J., holding that the ten per centum must be reserved on the whole contract price, and that the sub-contractor

was entitled to a lien thereon, whether it had been earned or not by the contractor; while the other members of the Court held that it was the duty of the owner to reserve only ten per cent. of the price of the work actually performed, and on this sum only the sub-contractors were entitled to a lien.

This construction of the statute is in favour of sub-contractors, but appears to us to impose on owners of land a very serious responsibility. For while it may be easy enough for them to reserve ten per cent. of the whole contract price, it may be very difficult indeed to determine day by day what is ten per cent. of the value of the work actually performed. The question, we believe, is likely to receive further elucidation shortly by the Court of Appeal.

Another statute has been passed at the recent session of the Ontario Legislature, making further amendments in the original Mechanics' Lien Act. In order to ascertain the law on this subject, therefore, it is now necessary to search through and compare the various provisions of four statutes. Considering the nature of this legislation, we cannot but think that this is one of all other statutory enactments which it should be the aim of the Legislature to keep in as easily accessible a form as possible; and that instead of putting a patch here, and a patch there, from session to session, the Act, as often as amendments are needed, should be re-enacted with the amendments required.

This, we think, should be the general rule as to Acts of Parliament. If it were we should possibly have less tinkering, and it would certainly give both the profession and the public a great deal less trouble in mastering the details of statute law,—a task which every year becomes more difficult, as the production of our two legislative mills is annually thrown upon the public.