

MECHANICS' LIENS.

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THE second section of 41 Vict. chap. 17, which amends the Mechanics' Lien Act has, we believe, given rise to a good deal of difference of opinion. That section, it will be remembered, provides that the "lien shall, in addition to all other rights or remedies given by the said Act, also operate as a charge to the extent of ten per centum of the price to be paid as aforesaid by such owner, up to ten days after the completion of the work, in respect of which such lien exists, or of the delivery of the materials, and no longer, unless notice in writing be given."

The questions which have arisen are both with regard to the price upon which the ten per cent. is to be reserved, and also as to the effect of the charge which the section creates.

We think the solution of these questions is not far to seek. In the first place it must be borne in mind that the section is one passed for the benefit of sub-contractors, that is to say, for that class of lien holders who do not contract directly with the owner of the land himself. And we may best understand the effect of the section in question by considering what the position of this class of lien holders was before the passing of the Statute. If we turn to section 11 of the original Act, R.S.O., c. 120, we shall see that *all payments* made in good faith by the owner to the contractor were protected, and operated to discharge the claims of sub-contractors *pro tanto*. And if we look at section 6 of that Act we shall see that the lien of a sub-contractor cannot in any case attach upon the estate and interest of the owner, so as to make the same, or the owner, liable to the payment of any greater sum than the sum payable by the owner to the contractor. The position, therefore, of a sub-contractor before the 41 Vict. was this, his right of lien could not

in any case be enforced to any greater extent than the amount which might remain due from the owner to the contractor through whom such sub-contractor might claim; and it might be defeated altogether by the *bona fide* payment by the owner to the contractor of the full amount due to the latter upon his contract.

Now, we do not find anything in 41 Vict. extending the liabilities of the owner. His liability is still governed by section 6 of the original Act, and the only change which the 41 Vict. c. 17, s. 2, effects is to require the owner to retain in his hands for ten days after all work shall have been completed, under any contract, ten per cent. of the price to be paid by him to the contractor by whom, or through whom, such work is done. We do not think that the sum to be reserved can by any possibility be intended to be calculated on the amount of the price to be paid to the sub-contractors, because the words of the section are, "the price to be paid by such owner," and the owner has nothing to do with the price to be paid to sub-contractors.

Neither do we think there is anything in the section which can be properly construed as giving the sub-contractor a right to the charge upon the ten per cent. required to be reserved, unless by performance of the work that sum becomes due and payable to the contractor. In other words, if the ten per cent. is never earned by the sub-contractors, we should think, can have no charge upon it.

All the 41 Vict. was intended to accomplish was to give sub-contractors a chance of making good their claim to the ten per cent. before it should be paid over to the contractor, and this will very clearly appear by a consideration of section 11 of the original Act as amended by 41 Vict., and in connection with which the second section is obviously intended to be read. Section 11 as amended protects all *bona fide* payments up to ninety per cent. made