

the order nisi had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs of the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem.

*Held* (affirming the decision of HUNTER, C.J.), that the mortgagee could not, after the order nisi for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the Court. *Stevens v. Theatres, Limited* (1903) 1 Ch. 857, and *Campbell v. Holyland* (1877) 7 Ch.D. 166 followed.

*Bodwell*, K.C., and *Shaw*, for appellant. *Davis*, K.C., and *Cayley*, for respondent.

Full Court.]

[Jan. 21.

BRITISH COLUMBIA MILLS TIMBER AND TRADING CO. v. HORROBIN.

*Mechanics' Lien Act, R.S.B.C.*, 1897, c. 132, *C.B. Stat.*, 1900, c. 20—*Material man—Lien by—Appropriation of payment on account.*

Defendant Horrobin contracted to build a house for defendant Henshaw. Horrobin contracted with plaintiff to supply the lumber and building materials. Previously to this, Horrobin, who was indebted to the plaintiffs, gave them a thirty day note for \$1,700 on which, about due date, he paid them \$1,000 on account, in doing which he overdraw his bank account by about that sum. A few days afterwards he was paid the sum of \$1,200 by cheque, stated on its face to be "re Mrs. Henshaw." This cheque Horrobin endorsed over to his bank, making good his overdraft, which he had obtained on the strength of the promise of defendant Henshaw's payment. Plaintiffs applied the \$1,000 payment to the reduction of the overdue note. Horrobin, through injuries received from a fall, was unable to give evidence at the trial, so that the statement by plaintiff's accountant that there was no appropriation by Horrobin of the \$1,000 to defendant Henshaw's account, was not contradicted. Plain-