

lien, and that some amount is really due and owing to the lien-holder. . . . The notice under sec. 11, sub-sec. c is purely informal, and was manifestly intended to be so, no form or special particulars of detail being prescribed in regard that it might have to be given promptly or by illiterate persons who might, as it were, read and understand the sections as they ran."

The payment of the percentage retained cannot validly be made to any person within the thirty days mentioned in sub-sec. 1. After the expiration of the thirty days payments may be validly made to lien-holders unless proceedings have been taken under secs. 23 and 24 to enforce a lien or charge against the percentage retained. Proceedings by one lien-holder would be sufficient as such proceedings would be available for other lien-holders claiming against the amount retained: *Wallace on Mechanics' Liens*, 2nd ed., 364.

In *Torrance v. Cratchley* (1900), 31 O.R. 546, Street, J., in referring to the 11th and following sections, says (at p. 549): "The only object of the provision requiring the owner to retain the twenty per cent. for thirty days appears to be that indicated by sub-sec. 3 of sec. 11, viz., to give persons entitled to liens an opportunity of enforcing them against the fund directed to be retained."

In a later case it was said that this section recognizes that the charge is a charge upon money to become payable to the contractor; and when, by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had and their lien fails: *Farrell v. Gallagher* (1911), 23 O.L.R. 130.

It was also held in 1911 that there is no sum "justly owing" or "payable" by the owner to the contractor where the building was never completed by the contractor and where the building contract provided that time was of the essence of the contract and stated a specific time for completion and fixed a specific sum for every day beyond a stated period that the owner is denied the full possession of the premises, and that a material-man therefore could not enforce liens against the land and had no relief under the Act, where the unpaid balance of the contract price would be absorbed by the "per diem" penalty clause, held under the circumstances to be really liquidated damages: *McManus v. Rothschild* (1911), 25 O.L.R. 138.

In *Farrell v. Gallagher*, 23 O.L.R. 130, 2 O.W.N. 635, the Divisional Court considered *Russell v. French*, 28 O.R. 215, to be in point, but was constrained, under the authority of *Mercier v. Campbell*, 14 O.L.R. 639, to give its own opinion independently of the decision in *Russell v. French*, which latter, in the opinion delivered by Middleton, J., was said not to be of "conclusive authority." The Divisional Court proceeded to a consideration of other sections of the Act (secs. 4, 10 and 11), and declined to interpret sec. 12 as constituting one of the exceptions to the general effect of sec. 11, which enacts that "same as herein otherwise provided" where the lien is claimed by any person other than the contractor, the amount which