

## HARRINGTON V. SAUNDERS.

## REPORTS.

COUNTY COURT OF THE COUNTY OF  
YORK.

## HARRINGTON V. SAUNDERS.

*Mechanic's lien—Failure of principal contractor—  
Ten per cent. lien postponed.*

(McDougall, Co. J., 1886.

H., a material man, supplied S., a sub-contractor, with bricks for a building being erected for the owner by one B., under contract. A term of the contract was that if B. failed to complete the work properly the contract could be relet by the owner, and B., charged with the difference in the cost (if any). B., the contractor, made an assignment for the benefit of creditors, and abandoned the contract after doing about \$770 worth of work, for which he had been paid \$543. The work was relet, and completed at an increased cost to the owner of \$360 over the original contract price.

*Held*, that H. took nothing under his lien, as the increased cost of completing the contract exceeded the difference between the value of the work actually done by B., the contractor, and the moneys paid thereon.

*Query*: Would this ruling apply to a lien for wages (45 Vict. Cap. 15 sec. 4)?

This was an action upon a mechanic's lien, brought by a material man against a sub-contractor who purchased the material from him, and also against the principal contractor and the owner of the land.

The facts, which were undisputed, were as follows: The defendant, Baillie, contracted in writing to erect for the sum of \$2,183, a building for the defendant, Hewlett; Baillie sub-let the masonry and brickwork to defendant, Saunders, at the contract price of \$936. The defendant, Saunders, purchased and had delivered to him by the plaintiff, bricks to the value of \$240, which went into the building. Baillie, after performing a portion of the work, became embarrassed, and made an assignment for the benefit of creditors.

Hewlett, the owner, under the terms of his contract with Baillie, advertised for tenders to complete the work, and relet the contract to his brother, who was the lowest tenderer.

The parties to this action for the purpose of this suit admitted the following figures to show the state of the account as regards all parties:—

Value of work done under contract by Baillie and Saunders, \$770; amount paid thereon, \$543. Increased cost to owner of completing the house beyond balance of original contract price with Baillie, \$360. This was a direct loss suffered by the owner by reason of his (Baillie's) default.

Last bricks delivered 6th January, 1886, lien filed 1st February and notice given Hewlett, the owner, on 1st February.

*Dr. Snelling*, for the plaintiff, contended upon the authority of *Re Cornish*, 6 O. R. 239, that the plaintiff was entitled to recover 10 per cent. of the value of the work done, viz.: \$77 (10 per cent. upon \$770), as the owner is bound to pay that amount, and that the fact of the owner being put to an extra outlay of \$360 beyond the contract price could not affect the result.

McDOUGALL, Co. J.—The facts in this case bring it within the class of case suggested by the Chancellor in his judgment in *Re Cornish* (p. 263) and as to which he declines to express an opinion. He says: "It is not necessary to consider what would be the result if the contractor making default had occasioned damage to the owner above the balance of the contract price, a state of facts which is hinted at in sec. 4 of 45 Vict. cap. 15 (O.), but left for some future plaintiff to ascertain by the assistance of the courts."

In *Goddard v. Coulson*, 10 App. 1, a case very similar in its facts to this case, Mr. Justice Patterson holds that section 11, as amended by the Act of 1878, is only "to charge in favour of the mechanics, etc., 10 per cent. of the money which becomes payable by the owner to the principal contractor," and in the same case he holds that the mechanic cannot recover anything, because "the contract price agreed upon never became the price to be paid, because the contractor failed to do what was necessary to earn it or to earn more than he was in good faith actually paid, that amount being under 90 per cent."

The act of 1882 did not apply to *Goddard v. Coulson*, the litigation having arisen before the passing of that Act, but it does apply to the present case. Reading that statute as being a later expression of the legislative will, I am of opinion that section 4 of 45 Vict. cap. 15 (O.), favours the view that the Legislature regarded the 10 per cent. lien as postponed to an owner's claim for damages for a failure on the part of the contractor to complete his contract, and that in that view they thought it necessary to provide expressly for the lien of wages. Whether in the case of wages, even, they have successfully legislated an unfortunate owner out of 10 per cent. of a contract price, for which he never became indebted to the contractor, must be left to some future owner to have settled, but in the meantime, as to the claim of a material man (as he is styled in many cases). I am of opinion that in all cases where there has been a failure on the part of the principal contractor and the completion of his contract has