

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

A. Weir, for the appellants.

J. M. Bullen, for the plaintiffs, respondents.

MIDDLETON, J., read a judgment in which he said that the contractor had not finished his work and had been overpaid by the owners. The contract was to do the entire work for a stipulated price; and the contractor, as he did not complete the building, in one view might not have the right to recover anything; but that was not of importance, as the owners had paid him more than would be recoverable in any event.

There seemed to be a curious misunderstanding as to the effect of the decided cases—Farrell v. Gallagher (1911), 23 O.L.R. 130; McManus v. Rothschild (1911), 25 O.L.R. 138; Rice Lewis & Son Limited v. George Rathbone Limited (1913), 27 O.L.R. 630; Russell v. French (1897), 28 O.R. 215.

Where, as in this case, there is but one payment called for by the contract, general lien-holders must take the situation as it is found to be, for there is no provision requiring the creation of a "statutory" fund for the protection of the lien-holders. Such a fund is created (sec. 12 of the Act) by deducting 20 per cent. by the owner "from any payments to be made by him in respect of the contract." When there is a lump-sum to be paid upon the completion of the contract, and the work is not done, nothing is payable.

Where the case can be brought within the modern relaxation of the strict rule as to entire contracts, now recognised in *H. Dakin & Co. Limited v. Lee*, [1916] 1 K.B. 566, and upon the taking of accounts upon the footing there recognised there is a balance due the contractor, the owner must retain 20 per cent. of this sum for possible lien-holders.

The appeal should be allowed and the actions dismissed with costs, to be taxed with due regard to the limitation found in the statute.

MEREDITH, C.J.C.P., agreed in the result, for reasons briefly stated in writing.

BRITTON and LATCHFORD, JJ., agreed with MIDDLETON, J.

*Appeal allowed.*