

HIGH COURT OF JUSTICE.

DIVISIONAL COURT.

DECEMBER 18TH, 1911.

SIMPSON v. RUBECK.

*Mechanics' Liens—Building Contract—Non-completion of Work
—Substantial Performance—Costs.*

Appeal by the plaintiff from the judgment of Mr. J. A. C. Cameron, Official Referee, dismissing without costs an action brought by the plaintiff to recover \$170, being the balance of the contract-price, including extras, for the construction of a verandah for the defendant, and to enforce a mechanics' lien therefor.

The Referee held that the plaintiff, not having completed his contract in accordance with the terms thereof in respect of the items in the judgment mentioned, was not entitled to payment or to a lien, upon the authority of *Sherlock v. Powell*, 26 A.R. 407, and *Cole v. Smith*, 13 O.W.R. 774.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

C. W. Plaxton, for the plaintiff. The contract rested in parol, the written tender of the plaintiff having been accepted verbally by the defendant, with the qualification or upon the understanding that "A1" lumber was as good as the plaintiff was ordinarily using in verandahs, and that the verandah in question was to be as good as the one next it, which had been built by the plaintiff; that the evidence shewed that "A1" lumber was not clear lumber, but the grade next to it, and was not disqualified so long as it was solid and free from black knots; that the evidence shewed the lumber used to be unobjectionable in these respects, and that the contract had otherwise been complied with. *Sherlock v. Powell* and *Cole v. Smith*, counsel contended, were distinguishable, the work and materials having been approved by both the defendant and her husband; and that, under sec. 7 of the Mechanics' Lien Act, the husband in this case must for such purposes be presumed conclusively to be the agent of his wife. In support of the doctrine of "substantial performance" counsel relied on *Addison on Contracts*, 10th ed., pp. 813, 814; *Lucas v. Godwin*, 4 Sc. 509, 6 L.J.C.P. 205; *Stavers v. Curling*, 6 L.J.C.P. 44; *Thornton v. Place*, 1 Moo. & R. 218; *Adams v. McGreevy*, 17 Man. L.R. 115; *Davis*