

*Re Cornish*, where the Court pointedly refrain from deciding the question at issue.

Upon principle it seems likewise unsound. The words "save as herein provided" may apply to other cases, as is pointed out in *Sears v. Woods*. And of themselves they establish nothing. The wage earner's priority is a two-edged argument, for it seems to shew an intention to provide only for the case of liens for wages, and certainly does not carry the priority upon the ten per cent. beyond that class. The Court of Appeal in *Goddard v. Coulson* so viewed this amendment. The argument that the ten per cent. of the value of the work done must of necessity be earned does not decide the question. It was not considered decisive in *Re Cornish*. But if actually earned, it may not, and generally is not payable by the terms of the contract, and even if so payable it is not made exigible by the sub-contractor, but only a charge upon it is given in his favour. The provision for a specific lien upon the ten per cent. is, therefore, the only change giving colour to the exclusion of the owner's claim for damages. But a lien can only exist upon a fund "provided such a portion remains or is in existence" (per Hagarty, C.J.O., in *Goddard v. Coulson*, p. 7), or as expressed by Patterson, J. (at p. 8), that provision cannot "do more than to charge, in favour of the mechanic, etc., ten per cent. of the money which becomes payable by the owner to the principal contractor."

The giving of a lien upon a fund presupposes a fund which must arise from something tangible. If it never comes into existence there is nothing for the lien to operate upon.

Even if in existence what is there in the statute which deprives the owner of his right to claim that it is set off or absorbed by his claim for damages. The rule, unless excluded by the express words of the statute, given by Ferguson, J., in *Re Cornish* (p. 270), is still applicable. The owner's equity is at least equal to that of a sub-contractor, not in privity with him, and in *Crone v. Struthers* (1875, 22 Gr. 247) is preferred to the latter.

The fair solution seems to be this: The owner's payments up to ninety per cent. are absolutely protected. The remaining ten per cent, if it becomes payable, or if it remains in hand after