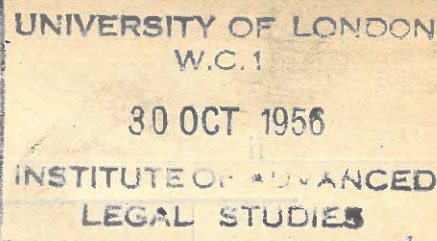


In the Privy Council.

No. 74 of 1907.



ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE CROWN GRAIN COMPANY,
LIMITED (Defendant) Appellants,

AND

HENRY L. DAY (Plaintiff) Respondent.

RECORD OF PROCEEDINGS.

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In the Privy Council.

No. 74 of 1907.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE CROWN GRAIN COMPANY,
LIMITED (*Defendant*) *Appellants*,

AND

HENRY L. DAY (*Plaintiff*) *Respondent*.

RECORD OF PROCEEDINGS.

No. 1.

In the King's Bench.

Thursday, the Thirty-first Day of August, A.D., 1904.

BETWEEN

Henry L. Day *Plaintiff*,

AND

The Crown Grain Company, Limited, and W. S. Cleveland . *Defendants*.
Statement of Claim.

1. The Plaintiff is a manufacturer and resides in the City of Minneapolis, in
10 the State of Minnesota, one of the United States of America.

2. The Defendants, The Crown Grain Company, Limited, are an Elevator
Company, incorporated according to the laws of the Province of Manitoba, and
doing business in the said Province of Manitoba. The Defendant, W. S. Cleveland,
is a contractor, residing in the said City of Minneapolis.

3. On and prior to the 2nd day of December A.D., 1903, the Defendants,
The Crown Grain Company, Limited, were the owners in fee simple or otherwise
and well entitled to and are still the owners of or otherwise well entitled to that
certain parcel or tract of land and premises situate, lying and being in the Town of

RECORD.

In the
Court of
King's Bench.

No. 1.
Statement of
Claim, 31st
August, 1904.

RECORD.
In the
Court of
King's Bench.

No. 1.
Statement of
Claim, 31st
August, 1904.
—continued.

St. Boniface in the Province of Manitoba, and being the most Westerly Six Hundred (600) feet of Block "G" according to a subdivision of the Dominion Government Survey of the Roman Catholic Mission in the Parish of Saint Boniface, registered in the Winnipeg Land Titles Office as No. 433, as described in instrument number 95343, registered in said Land Titles Office.

4. The Defendant, W. S. Cleveland, was contractor with the Defendants, The Crown Grain Company, Limited, for the erection of an elevator, and machinery to be used in connection therewith, for the said Crown Grain Company, Limited, upon the aforesaid lands, and the Defendant, Cleveland, entered into a contract with the Plaintiff, whereby the Plaintiff was to furnish all material and machinery, and do all the work necessary for the proper installing of a "dust collecting system," known as "The Day's Dust Collecting System," in the said elevator so being erected by the Defendant, Cleveland, for The Crown Grain Company, Limited, upon the said lands at or for the price or sum of \$3,020.00, which said contract between the Plaintiff and the Defendant, W. S. Cleveland, was dated the second day of December, A.D., 1903, and to which said contract the Plaintiff craves leave to refer at the hearing of this cause.

5. The Plaintiff duly at the request of the said Defendant, Cleveland, supplied a large portion of the material and machinery, and did a large portion of the work and labour necessary for the due installing of the said dust collecting system, and by reason of furnishing the said materials and machinery as aforesaid, and of doing the said work, the Plaintiff became, and is now entitled to a lien on the said lands, and the buildings erected thereon under "The Mechanics' and Wage Earners' Lien Act," and became entitled to such lien upon the furnishings of the first of such materials and the doing of the first of such work.

6. The Plaintiff's contract with the Defendant, Cleveland, has not as yet been fully performed or completed, but the furnishing, placing or supplying all the materials or machinery necessary is still in progress and incomplete, and the doing of the necessary work by the Plaintiff in connection with the said contract is still in course of performance, and the Plaintiff is willing and ready to perform what is still necessary and requisite on his part to be performed and fulfilled.

7. According to the terms of the said contract between the Plaintiff and the Defendant, Cleveland, the full amount of the contract price payable by the Defendant to the Plaintiff was to be paid thirty days after the completion of the contract.

8. The Defendant, Cleveland, and the Defendants, The Crown Grain Company, Limited, now refuse to allow the Plaintiff to complete his said contract.

9. The Defendants have paid to the Plaintiff the sum of \$1,000.00 on account of his contract price, and there is still owing and payable to the Plaintiff under the terms of his contract with the Defendants the sum of \$2,020.00 for materials supplied and the work done in connection with the erection of the elevator as aforesaid.

10. On or about the second day of July, A.D., 1904, the Plaintiff in pursuance of the said "The Mechanics' and Wage Earners' Lien Act" duly caused to be filed and registered in the Winnipeg Land Titles Office, being the office for the district in which the said lands are situate, and the proper office in that behalf, a statement of his claim or lien in the form provided by, and in pursuance of the

provisions of the said Act, which said statement of claim or lien was duly verified by the affidavit of the Plaintiff in pursuance of the provisions of the said Act.

11. The Plaintiff therefore claims:—

- (1.) Payment by the Defendant, Cleveland, forthwith of the said sum of \$2,020.00, together with interest thereon at the rate of 5 per cent. per annum until judgment.
- (2.) Costs of this action, and the costs of preparing and filing the said lien.
- (3.) That it may be declared that the Plaintiff has a lien and charge against the said lands and buildings, or the interest of the Defendants, The Crown Grain Company, Limited, therein for the said amount, and in default of payment of the said sum and costs that the said lands and buildings and all of the estate of the Defendants or either of them, therein, or a competent part thereof be sold and the proceeds thereof be applied in or towards payment of the Plaintiff's claim and the costs of this action, and for such purpose all proper directions be given and accounts taken.
- (4.) Such further and other relief as the nature of the case may require.

12. The Plaintiff proposes that this action be tried at the City of Winnipeg, in the Province of Manitoba.

Issued this 31st day of August, A.D., 1904, by Messrs. Campbell, Pitblado and Co., of the City of Winnipeg, in the Province of Manitoba, solicitors for the Plaintiff.

RECORD.

*In the
Court of
King's Bench.*

No. 1.
Statement of
Claim, 31st
August, 1904
—continued.

No. 2.

Statement of Defence of The Crown Grain Company, Limited.

1. All admissions made herein are made for the purpose of this action only.
2. This Defendant admits the allegations contained in the 1st, 2nd, and 3rd paragraphs of the statement of claim.
3. This Defendant admits that it entered into a contract with the Defendants, Cleveland, for the erection of an elevator and machinery on the premises referred to in the statement of claim, which contract was in writing and this Defendant refers to the said contract in this statement of defence as if the same were incorporated herewith.
4. This Defendant is not aware of the truth or falsity of the other allegations contained in the 4th paragraph of the statement of claim or of the allegations contained in the 5th, 6th, 7th, 8th, 9th, and 10th paragraphs of the statement of claim and puts the Plaintiff to strict proof thereof.
5. This Defendant says that the Defendant, Cleveland, failed to complete the said work under the said contract; that on the contrary, the said Defendant, Cleveland, defaulted in his contract to complete the said elevator and this Defendant was compelled to take over the work of completing the same and at the present time is engaged in completing the said elevator, all of which work should have been done by the Defendant, Cleveland. Under the terms of the said contract there are no moneys due by this Defendant to the Defendant, Cleveland.
6. A large number of garnishing orders have been served on this Defendant and a large number of orders for payment of money have been filed with this Defendant by the Defendant, Cleveland.

No. 2.
Statement of
Defence of
The Crown
Grain
Company,
Limited, 15th
Dec., 1904.

RECORD.

*In the
Court of
King's Bench.*

No. 2.
Statement of
Defence of
The Crown
Grain
Company,
Limited, 15th
Dec., 1904
—continued.

7. If the Plaintiff is entitled to a lien upon the property aforesaid, this Defendant can have no objection, on the completion of the work called for by the contract, to pay any amount due Cleveland in accordance with the said contract herein as directed by this Honourable Court.

8. This Defendant being unaware of the facts and being unable to determine as to the correctness of the statement of claim and the priority of the said claim and those of the garnishing creditors and assignees and creditors having orders as aforesaid, submits its rights in the premises to this Honourable Court.

9. This Defendant submits that it is entitled to be paid the costs of this action from any moneys which may remain in its hands on the completion of the 10 work called for by the contract.

Delivered this 15th day of December, A.D., 1904, by Messrs. Tupper, Phippen and Tupper, of the City of Winnipeg, in the Province of Manitoba, solicitors for the Defendant, The Crown Grain Company, Limited.

No. 3.
Judgment of
Richards, J.,
11th Sept.,
1905.

No. 3.

Judgment.

In the King's Bench

Monday, 11th of September, 1905.

Before The Honourable Mr. Justice Richards.

Between

Henry L. Day

and

The Crown Grain Company, Limited, and W. S. Cleveland

Plaintiff, 20

Defendants.

This action having come on for trial before the Honourable Mr. Justice Richards, on the eleventh, twelfth, thirteenth, fourteenth, fifteenth, seventeenth and eighteenth days of April, 1905, and the sixteenth day of July, 1905, and the said The Honourable Mr. Justice Richards having directed that the same should stand over for judgment, and the same coming on this day for judgment:

1. This Court doth order and adjudge that the Plaintiff do recover from the Defendant, W. S. Cleveland, the sum of \$2,140.60 and costs to be taxed. 30

2. And this Court doth declare that the Plaintiff and the several persons, firms and corporations who shall be found entitled to liens on the reference hereafter directed, are entitled to liens under "The Mechanics' and Wage Earners' Lien Act" upon the lands and premises hereinafter mentioned, being in the Town of St. Boniface, in the Province of Manitoba, and more particularly described as the Westerly six hundred (600) feet of Block "G" according to a plan of Sub-division of the Dominion Government Survey of the Roman Catholic Mission in the Parish of St. Boniface, registered in the Winnipeg Land Titles Office as Plan 443, and more particularly described in Instrument registered as number 95343 in the Land Titles Office for Winnipeg, to the extent of all moneys which under the provisions of "The Mechanics' and Wage Earners' Lien Act" should be available 40 in the hands of the Defendants, The Crown Grain Company, Limited, for payment of such liens and to the extent of all moneys still on hand and unpaid by the said

Defendants to their Co-Defendant, W. S. Cleveland, and to the extent of all moneys which the said Defendants, The Crown Grain Company, Limited, should have deducted and retained and now have on hand as required by the said Act.

3. This Court doth further order and adjudge that it be referred to the Master of this Court at Winnipeg to inquire, ascertain and take account of the moneys which, under the provisions of "The Mechanics' and Wage Earners' Lien Act," should be available in the hands of the Defendants, The Crown Grain Company, Limited, for payment of the liens referred to in paragraph two hereof and of all moneys still on hand and unpaid by the said Defendants, The Crown
10 Grain Company, Limited, to their Co-Defendant, W. S. Cleveland, being part of the moneys payable by the said Defendants to their Co-Defendant, W. S. Cleveland, for the erection of the elevator in question herein, and of all moneys which the said Defendants, The Crown Grain Company, Limited, should have deducted and retained and now have on hand as required by the provisions of the said "The Mechanics' and Wage Earners' Lien Act."

4. And this Court doth further order and adjudge that it be referred to the said Master, to inquire and state whether any person or persons, corporation or corporations other than this Plaintiff, has or have any lien under "The Mechanics' and Wage Earners' Lien Act," upon the said lands and premises to the extent
20 provided in paragraph two hereof, or has or have any encumbrance or charge upon the said lands and premises and to make such lienholder or lienholders, encumbrancer or encumbrancers (if any) party Defendants in this suit, and to take an account of what is due to said lienholder or lienholders, encumbrancer or encumbrancers (if any) for principal money and interest, except the Plaintiff, the amount of whose claim at the present time is found to be the sum of \$2,140.60 (together with his costs of this action, to be taxed) and to tax the said lienholder or lienholders, encumbrancer or encumbrancers (if any) made parties as aforesaid, their costs, and to settle priorities.

5. And this Court doth further order and adjudge that the said Master do
30 forthwith after the taking of such accounts and making of such inquiries, make his report to this Honourable Court.

6. And this Court doth further order and adjudge that the Defendants, The Crown Grain Company, Limited, do pay to the Plaintiff his costs of this action up to and including the trial to be taxed.

7. And this Court doth further order and adjudge that further directions and the costs of the reference hereby directed be reserved until after the said Master shall have made his report.

(Sgd.) WALTER A. WILKES,
Registrar.

Jan. 18, 1906.

No. 4

Reasons for Judgment.

Day v. Crown Grain Co., and Cleveland.

Richards, J., the Plaintiff did work and supplied materials as sub-contractor under the Defendant, Cleveland, who had contracted with Crown Grain Co. for the erection and equipment of an elevator.

RECORD.

In the
Court of
King's Bench

No. 3.
Judgment of
Richards, J.,
11th Sept.,
1905
—continued.

4C

No. 4.
Reasons for
judgment,
Richards, J.

RECORD.

*In the
Court of
King's Bench.*

No. 4.
Reasons for
judgment,
Richards, J.
—continued.

The Plaintiff registered a lien against the Crown Grain Co.'s property upon which the elevator was erected, to recover the contract price or cost of materials, or the unpaid portion thereof.

The substantial defence was that the Plaintiff was alleged to have completed his contract in full, and to have, thereafter, delayed more than thirty days before registering his lien, and that, for that reason, his lien was not a charge upon the land.

With some hesitation, I think that the Plaintiff never wholly completed his work, but that it was understood between his agents and Cleveland, or his agents, that the work was not finished, and that, when the rest of the elevator should be so far finished as to allow the machinery put in by the Plaintiff to be tested, his workmen would have to go back and test and complete the dust collecting system, which his sub-contract provided for the installation of by him.

When Plaintiff's workmen did return, and attempt to complete, they were prevented by the Company from so doing.

There will be judgment for Plaintiff against Cleveland for the unpaid balance of \$2,020.00, with interest at 5 per cent. from the date of registration of the Plaintiff's lien, and with costs and declaring Plaintiff to have a charge, for such moneys, interest and costs upon the land.

There will be a reference to the Master to take an account of the amount 20 which, under the provisions of "The Mechanics' and Wage Earners' Lien Act, should be available in the hands of the Crown Grain Company for payment of such liens as are valid charges upon the land, and an account of the still unpaid part of the moneys payable by the Company to Cleveland for the erection of the elevator, and an account of the existing claims of lienholders which are a charge upon the land, and to settle as between themselves, the rights and priorities of such lien holders, and to report any special facts or circumstances.

*In the
Court of
King's Bench
in Banc.*

No. 5.
Judgment,
10th May,
1906.

IN THE COURT OF KING'S BENCH IN BANC.

No. 5.

Judgment.

30

The Honourable Chief Justice Dubuc

The Honourable Mr. Justice Perdue

The Honourable Mr. Justice Mathers, in banc.

Thursday the Tenth day of May, A.D., 1906.

Between

Henry L. Day Plaintiff,

and

The Crown Grain Company, Limited, and W. S. Cleveland . Defendants.

Upon motion made unto this Court on the Seventh, Eighth and Ninth days of May, A.D., 1906, by the Defendant, the Crown Grain Company, Limited, by 40 its counsel, in presence of counsel for the Plaintiff, and Mr. G. A. Stewart Potts, counsel appointed by the Court to represent the lienholders (other than the Plaintiff), by way of appeal from the judgment of the Honourable Mr. Justice

Richards, delivered on the eleventh day of September, A.D. 1905, upon hearing read the praecipe in appeal and the evidence adduced at the trial and upon hearing what was alleged by counsel aforesaid, and this Court having been pleased to direct that the matter of the said appeal should stand over for judgment and the same having come on this day for judgment,—

RECORD.
In the
Court of
King's Bench
in Banc.

1. This Court doth order and adjudge, That the appeal of the Defendant, the Crown Grain Company, Limited, be, and the same is hereby allowed and that judgment be entered dismissing this action as against the said Defendant, the Crown Grain Company, Limited, with costs.

No. 5.
Judgment,
10th May,
1906
—continued.

10 2. And this Court doth further order and adjudge, That the Plaintiff do pay to the said Defendant; the Crown Grain Company, Limited, its costs of this appeal forthwith after taxation.

Dated this 4th day of December, 1906.

AUGUSTUS MILLS,
Dep. Prothonotary.

No. 6.

Reasons for Judgment.

Day v. Crown Grain Co.

No. 6.
Reasons for
judgment.
Perdue, J.

The Judgment of the Court was delivered by Perdue, J. We think the Plaintiff himself treated the contract as having been completed on 20th April, 1904. Burns does not appear to have intended to return, except for the purpose of testing the machinery. The Defendants accepted the work, raised no objections to it and say it operates completely to their satisfaction. *A test would not be a performance of a part of the work to be performed under the contract. It would only be for the purpose of finding defects and the Defendants say there were no defects.* Even if defects were found, under the authority of Neill v. Carroll 28 G.R. 7, 30 and Somers v. Beard 24 O.R. 641 the making good of these would not be a performance of a part of the work such as would receive the right to file a lien.

30 The lengthening of the sweeps in the basement was a piece of work which could be done by an ordinary tinsmith and as a fact it was not done by the Plaintiff.

The placing of sweeps in the top of machinery floor was not contemplated by the contract between the Plaintiff and Cleveland and was not required by Defendants.

The adjustment of the valves, if required, would not be a performance of part of the work. It would be merely curing a defect.

With great respect to the judgment of our brother Richards we think the appeal should be allowed with costs and the Plaintiff's action be dismissed with costs as against the Crown Grain Company.

40 Certified correct.

WM. PERKINS,
Off'l. Reporter Court of K. B. Manitoba.

RECORD.

*In the
Court of
King's Bench
in Banc.*

No. 7.
Notice of
Appeal to the
Supreme
Court of
Canada, 25th
May, 1906.

No. 7.

Notice of Appeal to the Supreme Court.

Between

Henry L. Day *Plaintiff,*
and

W. S. Cleveland and The Crown Grain Company, Limited . *Defendants.*

Take notice that Henry L. Day, the above-named Plaintiff, hereby appeals to the Supreme Court of Canada from the judgment of the Court of King's Bench in banc in this cause pronounced on the tenth day of May, A.D., 1906, whereby this action was dismissed as against the Defendants, The Crown Grain Company, Limited, with costs.

Dated at Winnipeg this 25th day of May, A.D., 1906.

CAMPBELL PITBLADO HOSKIN AND GRUNDY,
Solicitors for the Plaintiff.

To

MESSRS. TUPPER, PHIPPEN, TUPPER, MINTY AND MCTAVISH,
Solicitors for the Defendants, The Crown Grain Company, Limited.

No. 8.
Order grant-
ing leave to
Appeal, 7th
June, 1906.

No. 8.

Before The Honourable Mr. Justice Richards.

Thursday, the Seventh day of June, A.D., 1906.

20

Between

H. L. Day *Plaintiff,*
and

W. S. Cleveland and The Crown Grain Company, Limited . *Defendants.*

Upon the application of the Plaintiff for an order approving of the security given by the Plaintiff herein for the purpose of his appeal to the Supreme Court of Canada ; and for an Order allowing the appeal of the Plaintiff to the said Supreme Court ; and for an order approving of the security given by the Plaintiff herein for the purpose of a stay of execution upon the judgment appealed from, and for an order staying all proceedings on the said judgment until the determination of the said appeal, upon hearing what was alleged by counsel for the Plaintiff and the Defendants, The Crown Grain Company, Limited, and upon hearing read the bond given by the Plaintiff and the American Surety Company to the said The Crown Grain Company, Limited, for the sum of five hundred dollars (\$500.00) and the bond given by the Plaintiff and the American Surety Company for the sum of two thousand dollars (\$2,000.00) and upon hearing read the judgment of the Court of King's Bench in banc pronounced herein on the tenth day of May A.D. 1906 :

It is ordered that the said bond for five hundred dollars (\$500.00) filed as security by the Plaintiff for the purpose of his appealing to the Supreme Court of Canada, be and the same hereby is, allowed as good and sufficient security ;

And it is further ordered that the appeal of the Plaintiff to the said Supreme Court be and the same hereby is allowed ;

And it is further ordered that, subject to further order, the said bond for two thousand dollars, (\$2000.00) filed as security by the Plaintiff for the purpose of a stay of execution upon the judgment appealed from be, and the same hereby is, allowed as good and sufficient security for such purpose;

And it is further ordered that executions on the said judgment appealed from be, and the same hereby is, stayed in the original cause.

(Sgd.) A. E. RICHARDS, J.

RECORD.

*In the
Court of
King's Bench
in Banc.*

No. 8.
Order granting leave to Appeal, 7th June, 1906
—continued.

IN THE SUPREME COURT OF CANADA.

No. 9.

Between

10

Henry L. Day (Plaintiff) Appellant,

and

The Crown Grain Company, Limited, and W. S.
Cleveland (Defendants) Respondents.

*In the
Supreme
Court of
Canada.*

No. 9.
Notice of hearing, 6th April, 1907.

Take notice that this appeal will be heard at the next Session of the Court to be held at the City of Ottawa, on Tuesday the 7th day of May 1907.

Dated this 6th day of April A.D. 1907.

CAMPBELL PITBLADO HOSKIN AND GRUNDY
Solicitors for the Appellant.

20 To

TUPPER, GALT, TUPPER, MINTY AND McTAVISH
Solicitors for the Respondents.

No. 10.

Notice of Preliminary Objection.

In the Supreme Court of Canada.

Between

Henry L. Day (Plaintiff) Appellant,

and

30 The Crown Grain Company, Limited, and W. S.
Cleveland (Defendants) Respondents.

No. 10.
Notice of Preliminary Objection served upon Respondents' Solicitor and Counsel prior to argument of Appeal, 21st May, 1907.

Take notice that upon the hearing of this appeal the above-named Respondent Company will take the following preliminary objections to the appeal:

1. That under the Mechanics' Lien Act, being Chapter 110 Revised Statutes of Manitoba, Section 36, there is no appeal from the judgment of the Court below.

2. That the Appellant having signed final judgment against the Respondent, W. S. Cleveland, the Appellant's claim (if any) as against the Respondent Company must be treated as abandoned.

And further take notice that upon the hearing of the said objections the

b

B 2

RECORD.

In the
Supreme
Court of
Canada.

No. 10
—continued.

Respondent Company will refer to the pleadings and proceedings herein as shown in the appeal case and factums of the parties.

Dated this 21st day of May 1907.

TUPPER GALT AND CO.

Solicitors for the Crown Grain Co.

To

The above-named Appellant.

And to

A. E. HOSKIN, Esq.,
His Solicitor and Counsel.

10

No. 11.
Judgment,
24th June,
1907.

No. 11.

Judgment.

In the Supreme Court of Canada.

Monday the 24th day of June, 1907.

Present :

The Honourable Charles Fitzpatrick, Chief Justice,
" " Mr. Justice Davies,
" " Mr. Justice Idington,
" " Mr. Justice MacLennan,
" " Mr. Justice Duff.

20

Between

H. L. Day

and

The Crown Grain Company, Limited

(Plaintiff) Appellant,

(Defendants) Respondents.

The appeal of the above-named Appellant from the judgment of the Court of King's Bench for the Province of Manitoba, pronounced in the above-named cause on the tenth day of May, 1906, reversing the judgment of the Honourable Mr. Justice Richards, rendered in the said cause on the eleventh day of September, in the year of our Lord, 1905, having come on to be heard before this Court on the twenty-second day of May, in the year of our Lord, 1907, in the presence of counsel 30 as well for the Appellant as the Respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment, this Court did order and adjudge that the said appeal should be and the same was allowed, that the said judgment of the Court of King's Bench for the Province of Manitoba should be and the same was reversed and set aside, and that the said judgment of Mr. Justice Richards should be and the same was restored.

And this Court did further order and adjudge that the said Respondent should and do pay to the said Appellant the costs incurred by the said Appellant as well, in the said Court of King's Bench, for the Province of Manitoba as in this Court. 40

(Sgd.) E. R. CAMERON,
Registrar.

No. 12.

Reasons for Judgment.

Davies, J. (dissenting): For the reasons given by the Court below, I am of opinion that this appeal should be dismissed.

I do not think the time fixed by statute within which proceedings must be taken to enforce a mechanic's lien should be extended on evidence so unsatisfactory as that here offered. I fully agree in the appreciation given by the Court of Appeal to that evidence, that the Plaintiff himself treated the contract as completed on the 20th of April, 1904, and also as to the reason for Burns' intention to return.

10 The argument failed entirely to satisfy me that he intended to return with any idea of completing a contract he had already, in the view of both parties, practically and substantially completed.

MacLennan, J. (dissenting): I agree in the opinion of my brother Davies.

RECORD.

*In the
Supreme
Court of
Canada.*

No. 12.
Reasons for
judgment.
Davies, J.
(dissenting).

MacLennan, J.
(dissenting).

Idington, J: The Defendant, Cleveland, contracted with his Co-Defendants Idington, J. to build in Winnipeg a grain elevator.

It was specified in their contract that a complete dust collecting system was to be installed therein.

The system adopted was one in which at least two kinds of contrivances known as Day's patented dust collectors and Day's patented furnace feeders, of 20 which the Appellant was the patentee, were to be used.

The Appellant agreed with Cleveland to do the work and supply the material for that part of his contract with Respondents, which involved their complete system of dust collecting that was to be installed.

The Respondents had nothing to do with this sub-contract beyond approving the system or being satisfied with its execution. It was well known to them that the sub-contract was made, and no doubt also known, that it was necessary for their contractor Cleveland to obtain this patented machinery from Appellant, yet no attention was paid by the Company to the Mechanics' Lien Act.

If companies or others disregard the plain and obviously proper provisions of 30 this statute, they should not set up as is done here a wail about losing money thereby.

The questions for us are; Did the Appellant become entitled by virtue of the said Act to a lien upon the Respondent Company's property for the amount of work and material covered by this sub-contract? And if so,—Has he lost it by reason of failure to register within thirty days from the completion of such sub-contract?

The lien was registered on the 30th of June, 1904. It is not denied that the work was done, or that alternatively the work would have been done by Appellant, but for the action of Respondents.

It is claimed the lien was not registered in time. That depends on whether 40 the work was completed on the 19th April, 1904, or not.

The Appellant's work was on that date all done save some parts which would not cost very much to do, and which could have been done in a few hours had the rest of the work Cleveland had to do been ready to receive these parts in their proper place.

RECORD.

*In the
Supreme
Court of
Canada.*

No. 12.
Idington, J.
—continued.

Appellant's foreman arranged with the man in charge for Cleveland, that he, the Appellant's foreman, would do these things at a later date; that he would return for the purposes of seeing the machinery he had placed work properly and give satisfaction, and then could and would supply all the minor things in question.

He then went home to Minneapolis the domicile of Appellant also, and on the 20th April, having reported the state of his work to Appellant's book-keeper, the whole contract was charged up as if finished. The completion having been delayed by Cleveland, the Appellant was entitled to look to him for a substantial payment, having only received about one-third of his contract price. 10

On the 2nd of June, without instructions from anybody, the book-keeper wrote a letter to Respondent Company's manager calling attention to this, and stating that letters on the same subject to Cleveland remained unanswered, and that the work was completed.

This letter does not seem to have been answered.

The Respondents now lay stress upon the facts of this charging up the contract price and writing this letter, and they say that coupled with statements made by Appellant's foreman before leaving Winnipeg in April to the effect that he was "through," and was taking his tools and material away, there can be no doubt but that the Appellant's men supposed the work all completed, and that in fact 20 it must be inferred therefrom that it was completed on the 19th April.

This seems to have been relied upon in the Court below.

It appears to me an unwarranted conclusion when we find it as conclusively proven, as anything can be proven, by Clapp, the superintending foreman in charge of the work for Cleveland when Appellant's men left in April, that this foreman of Appellant was to return and finish as already stated.

Counsel for Respondents on the argument before us would not venture to cast the slightest doubt on the honesty of Clapp, and admitted he had no interest in the matter. How then, as I asked, could his story be impeached or affected by the circumstances already referred to? 30

I have not heard any answer to this. I cannot conceive any effective answer possible. The book-keeper, being human, erred. No claim resting on such obvious error can stand. It led to giving an appearance of truth to the ground relied upon by Respondents. It was however, I fear, merely an appearance of truth.

The test question here is whether or not the Appellant could in law have sued on the 20th of April and recovered from Cleveland as for a completed contract.

I am of opinion he could not. Trifling as the parts unfinished were, the party paying in such a case was entitled to insist on the utmost fulfilment of the contract, and to have these parts so supplied that the machine would do its work. 40

We must not overlook the nature of the work to be done, and the possibility of the slightest departure from the true way to construct rendering it worthless.

I am not surprised to learn that workmen doing this class of work desire as well for their own reputation as for the purpose of satisfying their patrons that they should see it running, and running in good order, before considering it completed.

Obviously the machine was absolutely useless without some of the parts that

remained to be attached thereto, and another part of it so defective as to be liable to burn the buildings down, and leave the Appellant, in that event, if he had so handed it over, liable to an action.

Apply these tests, and the cases relied on below have no application here.

Truly the things in question do look trifling; so does the most of patented machinery to the wise people that see it working.

I am abundantly satisfied that if we had been hearing the converse of this case, on the facts it presents in an action begun by Appellant, in April, when the work was charged up in the books, we would have been told by Respondents that a clearer
10 case of an unfinished contract could not be found.

I fear interest blinds the apprehension.

I think the appeal should be allowed with costs, and the judgment of the learned trial Judge restored with costs of Court below.

Chief Justice: I concur in the opinion stated by Mr. Justice Idington.

Duff, J.: I concur in the opinion stated by Mr. Justice Idington.

RECORD.

*In the
Supreme
Court of
Canada.*

No. 12.
Idington, J.
—continued.

Fitzpatrick,
C.J.
Duff, J.

No. 13.

H. L. Day (Plaintiff) Appellant,

and

The Crown Grain Company, Limited (Defendants) Respondents.

20 I hereby certify that the costs of the Appellant in the above case have been taxed and allowed at the sum of fourteen hundred and forty-three dollars and eighty-nine cents (\$1,443.89).

"E. R. CAMERON,"

Registrar.

Dated this 14th day of October A.D. 1907.

No. 13.
Allocatur,
14th Oct.,
1907.

No. 14.

IN THE PRIVY COUNCIL.

Between

The Crown Grain Company, Limited Appellants,

and

30 Henry L. Day Respondent.

It is hereby agreed that the following documents be included in the Record to be printed for the use of the Judicial Committee on the hearing of the appeal herein:

1. Copy of pleadings.
2. Reasons for judgments of Trial Judge and Court of Appeal, and judgments as entered by said Courts.
3. Notice of preliminary objection served upon Respondent's solicitor and counsel prior to argument of appeal.
- 40 4. Reasons for judgment given in the Supreme Court of Canada, and judgment entered thereon.

*In the
Privy
Council.*

No. 14.
Consent as to
documents,
20th Jan.,
1908.

RECORD.

*In the
Privy
Council.*

No. 14.
Consent as to
documents,
20th Jan.,
1908
—continued.

5. (a) Notice of appeal.
(b) Order June 7th, 1906, allowing appeal.
(c) Notice of hearing.
(d) Allocatur.

Dated January 20th, 1908.

TUPPER, GALT, TUPPER, MINTY AND McTAVISH,
Solicitors for Appellant.
CAMPBELL PITBLADO HOSKIN AND GRUNDY,
Solicitors for Respondent.

No. 15.
Consent,
3rd March,
1908.

No. 15.

10

Between

The Crown Grain Company, Limited *Appellants,*
and

Henry L. Day *Respondent.*

We consent that the Official Report 39 Canada Supreme Court Report pages 258 to 264 inclusive be referred to as part of the Record herein without it being printed at length.

Dated 3rd March, 1908.

LAWRENCE JONES & Co.,
Solicitors for Appellant. 20
HARRISON AND POWELL,
Solicitors for Respondent.

No. 16.
King's Order
granting
leave to
Appeal,
21st Dec.,
1907.

No. 16.

King's Order.

At the Court at Buckingham Palace.

The 21st day of December, 1907.

* * * * *

"The Lords of the Committee in obedience to Your Majesty's said General Order in Council have taken the said humble Petition for leave to appeal into consideration and having heard counsel in support of the Petition and in opposition thereto their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Ruling and Order of the Supreme Court of Canada pronounced on the 22nd day of May, 1907 (A) dismissing the Petitioner's Motion to quash the Appeal to the said Supreme Court on the ground that by virtue of Section 36 of 'The Mechanics' and Wage Earners' 'Lien Act, 1902,' the said Appeal was incompetent and (B) ordering the argument

"to proceed upon the merits of the Appeal upon condition that the Petitioner do deposit in the Registry of the Privy Council the sum of £300 sterling as security for costs.

"And their Lordships do further report to Your Majesty as their opinion that the Attorney-General for the Dominion of Canada and the Attorney-General for the Province of Manitoba ought to be at liberty to intervene in the said Appeal and to lodge such cases therein as they may respectively be advised and to appear in person or by counsel at the hearing of the said Appeal.

10 "And their Lordships do further report to Your Majesty as their opinion that the certified copy of the Transcript of Proceedings produced on the hearing of the said Petition so far as the same relates to the question of law decided by the said Ruling and Order of the said Supreme Court ought (subject to any objection that may be taken thereto on behalf of the Respondent) to be accepted as the Record proper to be laid before Your Majesty on the hearing of this Appeal."

His Majesty having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof, and to order as it is hereby ordered that leave be and the same is hereby granted to the Petitioner to enter and prosecute his Appeal against the said Ruling and Order 20 of the Supreme Court of Canada pronounced on the 22nd day of May, 1907 (A) dismissing the Petitioner's Motion to quash the Appeal to the said Supreme Court on the ground that by virtue of Section 36 of "The Mechanics' and Wage Earners' Lien Act, 1902," the said Appeal was incompetent and (B) ordering the argument to proceed upon the merits of the Appeal upon condition that the Petitioner do deposit in the Registry of the Privy Council the sum of £300 sterling as security for costs.

And it is hereby further ordered that the Attorney-General for the Dominion of Canada and the Attorney-General for the Province of Manitoba be at liberty to intervene in the said Appeal and to lodge such cases therein as they may 30 respectively be advised and to appear in person or by counsel at the hearing of the said Appeal.

And the certified copy of the Transcript of Proceedings produced on the hearing of the said Petition so far as the same relates to the question of law decided by the said Ruling and Order of the said Supreme Court is to be accepted (subject to any objection that may be taken thereto on behalf of the Respondent) as the Record proper to be laid before His Majesty on the hearing of this Appeal.

Whereof the Governor-General, Lieutenant-Governor or officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly. 40

A. W. FITZROY.

RECORD.

In the
Privy
Council.

No. 16.
King's Order
granting
leave to
Appeal,
21st Dec.,
1907
—continued.

No. 17.

RECORD.

*In the
Privy
Council.*

Acceptance of Service of King's Order.

The Crown Grain Company, Limited *Appellants,*
and

Henry L. Day *Respondent.*

No. 17.
Acceptance of
Service by
the Attorney-
General of
Manitoba
18th Jan.,
1908.

I hereby acknowledge the receipt of a copy of the Order made by the King's Most Excellent Majesty in Council, bearing date the 21st day of December, 1907, granting to the Appellant leave to enter and prosecute an appeal against the ruling and order of the Supreme Court of Canada pronounced on the 22nd day of May, 1907 (A) dismissing the Appellant's Motion to quash the appeal, &c., 10 and (B) ordering the argument to proceed upon the merits, &c.

Dated at Winnipeg in the Province of Manitoba, this 18th day of January, 1908.

COLIN H. CAMPBELL,
Attorney-General for Manitoba.

In the Privy Council.

No. 74 of 1907.

*On Appeal from the Supreme Court
of Canada.*

BETWEEN

THE CROWN GRAIN COMPANY,
LIMITED . . . (Defendant) Appellants,

AND

HENRY L. DAY . . . (Plaintiff) Respondent.

RECORD OF PROCEEDINGS.

LAWRENCE JONES & CO.,
59 & 60, Cornhill, E.C.
for Appellants,

HARRISON & POWELL,
5, Raymond Buildings,
Gray's Inn,
for Respondent.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand,
for Attorney-General of Canada (Intervener).