# SUPREME COURT OPINIONS HANDED DOWN LAST TUESDAY

## OREGON SUPREME COURT DECISIONS

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**Crane Company v. Ellis, et al, Columbia County.**

Crane Company, respondent, v. M. Ellis, defendant and appellant. The Adamant Company and Nottingham & Company, defendants and respondents, and W. A. Currie, defendant. Appeal from the circuit court for Columbia county. The Hon. Thos. A. McBride, J. Argued and submitted March 8, 1911. J. T. McKee (and Cake & Cake, on brief) for respondent Crane Co. E. B. Seabrook (and Gemmans & Malarkey on brief) for appellant. Kollock & Zollinger (on brief) for respondent, The Adamant Co. A. T. Lewis, for respondent Nottingham & Co. Eakin, C. J.: Reversed.

Eakin, C. J.: This is a suit to foreclose mechanics' liens. Plaintiff alleges that it has a lien in the sum of $114.87 for material and labor furnished to defendantW. A. Currie, contractor, in the erection of a building in Rainier, Columbia county, Oregon, defendant M. Ellis being the owner of the lot and building; that a notice of lien was filed October 30, 1907, in the office of the county clerk of that county, alleging that the building was completed on October 15, 1907. Plaintiff further alleges that W. P. Fuller & Company secured a lien on the building for the sum of $300 for material furnished to Currie in the construction thereof, notice of which lien was filed in the county clerk's office on the 31st day of October, 1907, and that thereafter such company duly assigned its claim and lien therefor to plaintiff. It is further alleged that the Adamant Company and Nottingham & Company claim some interest in this property, and they are made parties defendant. The Adamant Company, by answer, alleges that it has a lien upon the building for the sum of $140.40, for material furnished to Currie for the construction thereof, notice of which lien was filed in the county clerk's office on the 12th day of November, 1907; and Nottingham & Company alleges that it has a lien in the sum of $130 upon such building for material furnished to Currie in the construction thereof, notice of which lien was filed in the county clerk's office November 11, 1907.

The answer of defendant Ellis makes special denials of parts of the complaint and alleges that the building was completed on February 10, 1907; and that the notices of lien were not filed within 30 days after its completion, and, therefore, no liens are evidenced thereby. He makes similar answer to the cross-complaints of the Adamant Company and Nottingham& Company.

The validity of the liens depends upon the time of the completion of the building. The contention of plaintiff is, that although the main structure of the building was erected by March 1, 1907, and was occupied thereafter by Ellis, the sewer connection between the building and the main sewer was not made until October 15, 1907; that it had been constructed from the street sewer toward the house prior thereto but lacked two and one-half or three feet of connecting with the pipe extending out from the house and that Currie completed the connection by placing a joint and a half of tile therein on October 15, 1907.

There is no contention that any other construction work was done after the middle of August, at which time the cement floor was laid in the basement. There is some conflict in the evidence whether the sewer had been connected before October 15, but the evidence is convincing that it had been. Mr. Haggan, a witness called by plaintiff, and who was employed by Currie about the first of August to test the pipes and complete the connection with the sewer, testified that, after the sewer was tested, he went to connect it and found that it had been connected; that it was being used and water was running through it into the street sewer, which would have been impossible if it had not been connected; that at that time he repaired a leak, at the point where the Ellis draw enters the street sewer, with cement; and that this was done prior to August 22. Mr. Plue, superintendent of the work for Ellis, testifies that, at the time Currie was laying the basement floor, about the first of August, he went over the sewer with Currie from one end to the other and that it was connected and was being used. Mr. Huycke, a clerk in the building (a store) testifies that the sinks and toilets were used constantly after about the 15th of August. Mr. Gulker, who aided in laying the floor of the basement in August, says that the sewer was being used at that time. The only evidence that it was not connected was by Currie, who is corroborated by Henry Nickert, who helped in placing the tile necessary to connect it, as he alleges, on October 15, 1907. But Nickert did not know whether Currie had been there before or not, or what the condition of the sewer was prior to that time.

We think the conclusion is irresistible that whatever was done to the sewer, after August 15, 1907, was not construction but repair work. The contract of construction was made in August, 1906, and required the completion of the building on or before December 1, 1906, to the satisfaction and under the direction of Mr. W. D. Plue. It was completed about the 28th day of February, 1907, except at that time, because of the wet condition of the ground, the contractor's time to cement the floor of the basement was extended until it dried out. That was completed about the 15th of August, 1907. Any other delay in the work, if any, was unreasonable, and the item alleged as constituting the completion of the work done 10 and a half months after the time limited by the contract was so unreasonable and long delayed that the contractor and those claiming under him are not entitled to any advantage thereby, even if it was construction work. The owner of the building had a right to know when the building was completed and to act thereon for his own protection. In this case the only witness, except Nickert, by whom plaintiff has attempted to establish the date of the completion of the work, is the contractor, to whom was paid the contract price for the contraction of the building, at a time when he led the owner to believe the building was completed, reserving a small amount of the contract price pending repairs of defects in construction. From this money the contractor should have paid those who furnished him material, and he now resorts to this trifling circumstance to compel Ellis to pay them for him, —a circumstance which we cannot overlook in determining the weight to be given to the evidence.

This question was considered in Coffey v. Smith, 52 Or. 544, in which case Mr. Commissioner Slater says: "After the substantial completion of his contract on or about August 13, plaintiff should not be permitted, by unreasonable delay in the performance of trifling matters, which could and should have been done at an earlier time, postpone the date from which the time allowed by the statute begins to run * * * and the burden is on the lien claimant to show affirmatively that there was no unnecessary or unreasonable delay." In that case the situation was very similar to the present once. Even if the sewer was not connected until October 15, 1907, yet the circumstances were such that the omission could not operate to revive the right to file the lien. But we find from the preponderance of the evidence that it was connected and the building was completed prior to August 15, 1907. These lien claimants are charged with notice of the terms of the contract and there is nothing in the evidence to indicate that they were misled in any way. On the contrary, if they were noticing the progress of the building, they must have known that it was completed in February, except the basement floor which was completed before August 15.

The decree of the lower court is reversed and one will be entered here dismissing the suit, with costs to defendant Ellis both in this and the lower court.

Mr. Justice McBride took no part in this decision.

**Hahn v. Astoria National Bank, et al, Clatsop County.**

John Hahn, appellant, v. Astoria National Bank and J. E. Higgins, respondents. Appeal from the circuit court for Clatsop county. Hon. J. U. Campbell, judge. Submited on brief March 15, 1911. Motion to dismiss appeal. G. C. Fulton, for respondents. William C. Bristol, for appellant. Moore, J.: Motion denied, with privilege of renewing at hearing.

Moore, J.: This is a motion to dismiss an appeal on the ground that it was not taken within six months from the time the decree was rendered. This cause having been tried, the suit was dismissed January 4, 1910, and seven days thereafter plaintiff's counsel moved to set aside the decree. The term at which the suit was dismissed expired by limitation February 12, 1910, without the court hearing the application or making any order continuing it. The motion last mentioned was denied November 25, 1910, and on the 21st of the following month an appeal was taken from such order and also from the decree.

The rule formerly regulating the setting aside of a judgment was, so far as involved herein, as follows: "The motion shall be heard and determined during the term, unless the court continue the same for advisement or want of time to hear it. When not so heard and determined or continued, it shall be deemed withdrawn and may be disregarded." L. O. L. Sec. 175. This statute was amended at the legislative session of 1911 by an act which went into immediate effect, and contains a clause as follows: "Every appeal heretofore taken within six months from the expiration of the time granted by any circuit court or judge thereof for filing a motion to set aside the verdict and for a new trial, or, if such motion shall have been filed within such time, then within six months from the date of the entry of the order granting or denying such motion shall be, and is, if such appeal is now pending and undetermined in the supreme court, hereby validated, and shall be deemed to have been taken within the time required by law; provided, however, that nothing herein contained shall be deemed to authorize any appeal to be hereafter taken to the supreme court from any judgment of any circuit court granting or denying a motion to set aside the verdict and for a new trial unless such appeal be taken within six months from the date of the original entry of judgment."

Some doubt exists as to whether the original statute or this amendment is applicable to appeals from decrees in equity and such being the case, it is deemed proper to deny the motion for the present with leave to renew it when the cause is heard on its merits, and it is so ordered.

**Grover, et al, v. The Hawthorne Estate, et al, Multnomah County.**

LaFayette Grover and Elizabeth Grover, appellants, v. The Hawthorne Estate and Rachel Hawthorne, respondents. Appeal from the circuit court for Multnomah county. The Hon. Henry E. McGinn, Judge. On motion for leave to examine witnesses. Manning & White, Robert E. Hitch and E. S. J. McAllister, for appellants. C. H. Dolph, S. T. Richardson and Snow & McCamant, for respondents. Per Curiam. Denied.

Per Curiam: In this cause the appeal was perfected on January 2, 1911. The transcript was filed on February 28, 1911. On March 10, 1911, respondents moved to dismiss the appeal because the transcript was not filed within the time limited by law. Appellants filed a motion on March 15, 1911, sugesting a diminution of the record and secured an order on the clerk below to certify to this court a certain order made by the lower court on March 10, 1911, nunc pro tunc, as of date January 30, 1911, extending the time for filing the transcript on appeal 30 days. Thereafter on March 23, respondents applied to this court, under the provisions of Sec. 832 L. O. L., for an order requiring the affiants in the affidavits filed in this court on March 15, 1911, to appear before the clerk of this court that they may be examined by respondents concerning the statements set forth in such affidavits in aid of an application to vacate the nunc pro tunc order.

The order of this court upon the clerk of the lower court of date March 15, above mentioned, is not a provisional remedy within the meaning of Sec. 832 L. O. L. Nor is this court the proper place to take evidence upon proceedings pending in the circuit court. If the nunc pro tunc order is applied for in the lower court, the right to it must be determined by that court. The application is denied.