SUPREME COURT DECISION.

(Continued from Page 3.)

ahead and perform the work under the direction and superintendence of defendant, Mrs. Hassan, and, according to her wishes, purchase the necessary materials, and that she would pay for them. On June 11, 1908, plaintiff secured the work, under these conditions, and labored and furnished other labor and materials to the amount claimed in the complaint. The work seems to have progressed from time to time with a continual series of changes of plans on the part of Mrs. Hassam, until August 6, 1908, when plaintiff and his workmen left, and plaintiff did not return until a few days later, when he found that Mrs. Hassan had employed other workmen to complete the building.

We are of the opinion that the delay of plaintiff in completing the building was caused primarily by Mrs. Hassan's failure to provide and have ready the roofing, which she had undertaken to provide, for the continuance of the work; and that, while nearly every fact above stated is disputed by her, the preponderance of the testimony is in favor of plaintiff's contention.

There remains but one serious contention and that is, whether, under the facts above stated, plaintiff is an original contractor within the meaning of the law, and, if so, whether he has sufficiently pleaded performance of his contract. Section 7420 L. O. L. makes it the duty of every orginal contractor to file his lien within 60 days from the completion of his contract, and of every mechanic, artisan, etc., or other person, to so file within 30 days after the completion of the alteration or repair, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials herefor. The lien in question was filed 57 days after the last work was done, and unless plaintiff is an original contractor, his claim was filed too late to be within the statute. If plaintiff was engaged merely to work for an indefinite time under the direction of defendant, he would be a mere laborer and his rights to a lien would expire within 30 days from the last day that he performed work.

An orginal contractor, within the meaning of the mechanic's lien law, is one who furnishes labor, or labor and materials, upon a contract direct with the owner: Boisot on Mech. Liens, Sec. 220. The contract need not be express, but may be implied. The complaint in this case states substantially a contract to alter and repair a dwelling house and to perform and furnish the labor to so alter and repair it. So far it states an original contract with the owner to do a particular thing, but it fails to state that the contract was completed or to give any reason why it was not completed, or to state the date of the completion of the building.

In Curtis v. Sestanovich, 26 Or. 107, which involved a lien for labor and materials, this court held that it was unnecessary to state in the notice of lien the date of the completion of the building if, in fact, it was completed within 30 days, but in that case the omission to state the date of completion was in the notice and not in the complaint. Here both the notice and the complaint are silent on that subject. Section 7420 makes it a prerequisite of a valid, original contractor's lien that it shall be filed within 60 days after the completion of the cotnract and a complaint which does not show this fact does not state a cause of suit.

The suit will be dismissed without prejudice to any action at law that plaintiff may see fit to institute.

Price v. Warner, et al. Marion County.

Decided, October 10, 1911.

J. L. Price, appellant, v. A. L. Warner, A. L. Clearwater and S. A. Jefferson, defendants. A. L. Clearwater, respondent. Appeal from the circuit court for Marion county. The Hon. Geo. H. Burnett, judge. Argued and submitted Sept. 26, 1911. C. L. McNary and (John H. McNary and W. C. Winslow, on brief) for appellant. S. T. Richardson and W. E. Keys, for respondent. McBride, J. Affirmed.

Defendant Clearwater was the indorser of a promissory note, executed by Albert Warner. It was duly presented for payment and dishonored. The note was payable in Salem, where defendant resided. The person giving the notice of dishonor also resided in Salem. The day subsequent to the presentation of the note for payment, plaintiff's agent called at defendant's place of business for the purpose of giving him notice of the dishonor of the note, and found that he was temporarily absent from the city. He repeated his visits for four or five days, and on each day found him still absent. Afterwards he saw him and gave him notice.

Section 5929 L. O. L. is as follows: "The notice may be in writing, or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails." Section 5936 reads: "Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times: (1) If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following; (2) if given at his residence, it must be given before the usual hours of rest on the day following; (3) if sent by mail, it must be deposited in the postoffice in time to reach him in usual course on the day following." Section 5946 reads: "Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence."

At the conclusion of plaintiff's testimony, the court, on motion of defendant, granted a nonsuit and plaintiff appeals.

McBride, J. Taken in connection with the other sections of the statute quoted above, the word "may" in Sec. 5929 should be construed to mean "must." The conjunction "or" indicates the alternative and is equivalent to "either", as if to say, "either one thing or another thing," must be done: (Sheppard v. City of New Orleans, 51 La. Ann. 847. Plaintiff was required by Sec. 5936 supra to give notice the day following the dishonor of the note, either by mail or personally, unless the delay were excused by the contingency mentioned in Sec. 5946. The law does not excuse a delay caused by the impossibility of giving notice in a particular manner but only excuses a delay caused by the impracticability of giving notice at all.

In this case a notice sent through the mail would have fulfilled every demand of the statute. The plaintiff asks that the delay be excused not because circumstances beyond his control rendered it impracticable to give notice sooner but because he was unable to give it sooner in the manner attempted. The judgment of the circuit court is affirmed.

Hodgdon and Hodgdon v. Goodspeed, et al, Tillamook County.

Decided, October 3, 1911.

George N. Hodgdon and Marvin Hodgdon, respondents, v. H. F. Goodspeed, as county judge of Tillamook county, Oregon; J. C. Holden, as county clerk of Tillamook county, Oregon and L. D. Krake, defendants. L. D. Krake, appellant. Appeal from the circuit court for Tillamook county. Hon. Wm. Galloway, judge. Argued and submitted September 19, 1911. Holmes & Handley on brief for respondents. Oak Nolan for appellant. Moore, J. Affirmed.

This is a special proceeding to review the action of an inferior tribunal. Pursuant to a petition for a writ of review the writ was issued and the return shows that L. D. Krake commenced an action in the county court of Tillamook county against George N. Hodgdon and Marvin Hodgdon to recover $367 as damages for an alleged breach of an agreement. An amended complaint was filed October 25, 1909, and service thereof acknowledged on that day but no order was ever made prescribing the time in which an answer should be filed. The averments of the amended complant not having been controverted the county clerk, on the plaintiff's written application, recorded a default December 18, 1909, and thereupon entered judgment against the defendants for the sum demanded. Three days thereafter a motion was interposed to set aside the judgment on the grounds that it was rendered through surprise, inadvertance and excusable neglect, in that an agreement had been made by the parties whereby no answer was to be filed during negotiations for a settlement of the controversy which were then pending, nor until one of the defendants' attorneys, who was absent, returned not later than December 31, 1909, and that he had not arrived when the judgment was entered. The motion was supplemented by an affidavit and an answer to the merits was tendered.

Plaintiffs' counsel filed a counter affidavit which sets forth that it was understood that no answer was to be filed until December 15, 1909.

Defendants' counsel on December 29, 1909, filed another motion to set aside the judgment for that no time had been fixed by the court in which to answer and that their clients had never been in default—supplementing the application by an affidavit.

The county court on January 11, 1910, denied the motion, to review which order these proceedings were instituted by George N. and Marvin Hodgdon against H. F. Goodspeed and J. C. Holden as county judge and clerk respectvely and L. D. Krake. The record, papers, etc., having been certified up to the circuit court, the judgment of the county court was annulled and the cause remanded with directions to fix a time in which the answer in such action should be filed and from the latter judgment Krake alone appeals.

Moore, J. It is insisted that the petition for the review did not state facts sufficient to authorize the issuance of the writ, in refusing to quash which an error was committed. A petition in such case must describe with convenient certainty the decision or determination of the inferior court, officer or tribunal complained of; set forth the errors alleged to have been committed; be signed by the plaintiff or his attorney and verified by the certificate of an attorney of the court to the effect that he has examined the process or proceeding and the decision or determination therein, and that the same is erroneous as alleged in the petition. The petition, the sufficiency of which is assailed, alleges in effect that the defendants in the proceeding, Goodspeed and Holden, are the county judge and clerk respectively of Tillamook county; sets out copies of all the papers filed in the action mentioned and the orders made and judgment rendered therein as hereinbefore stated; avers that the county court exercised its judicial functions erroneously and exceeded its jurisdiction to the injury of the substantial rights of the plaintiffs herein, setting forth in concise order the errors alleged to have been committed. The petition is also verified by the certificate of an attorney of the court in the manner prescribed.

The adverse parties and the court were thus advised of the particular questions to be determined, and the errors alleged to have been committed are assigned with particularity. The petition complied with the requirements of the statute and was sufficient to authorize the issuance of the writ. Southern Oregon Co. v. Coos County 30 Ore. 250; White v. Brown 54 Ore. 7.

It is maintained that the circuit court did not have jurisdiction of the cause and for that reason an error was committed in denying the motion to quash the writ. It is argued that the entry of the judgment by the county clerk was a ministerial act, the performance of which cannot be reviewed. A ministerial act consists in the discharge of some duty enjoined by law upon one or more persons who, in obeying the rule prescribed, exercise no judgment or discretion regard the matter. 5 Words & Phrases 4523.

Review is the statutory remedy, enacted in lieu of certiorari, and the writ and its return are employed to determine whether or not an inferior court, officer or tribunal in the exercise of judicial functions has applied such power erroneously or has exceeded the jurisdiction conferred. L. O. L. Sec. 605. Judicial or quasi judicial acts only can be reviewed. Harris, Certiorari Sec. 48; Thompson v. Multnomah county 2 Ore. 34; Burnett v. Douglas County 4 Ore. 388. In an action arising upon contract for the recovery of money or damages only, if no answer be filed within the time limited, the clerk, upon the plaintiff's written application therefor, is required to enter the default and thereupon to give judgment for the sum demanded against one or more of the defendants who have rendered amenable by appearance or service of process. L. O. L. Sec. 185. In entering a judgment upon default, the clerk acts in a ministerial capacity; exercises no judicial functions; and must conform strictly to the provisions of the statute or his proceedings will be without any binding force. Kelly v. Van Austin 17 Cal. 564. When the clerk is authorized to enter judgment upon default, but, in the employment of the power conferred makes a mistake as to the amount due plaintiff, the judgment is not void but erroneous; but where he enters a judgment which is wholly unauthorized, the judgment is void. Bond v. Pacheco 30 Cal. 530.

When a void judgment is called to the attention of a court in which it was entered it is incumbent upon that tribunal to purge its records of the nullity by cancelling the entry. Huffman v. Huffman 47 Ore. 610; Rynearson v. Union County 54 Ore. 181. If upon application a void judgment is not set aside, the invalidity is attempted to be upheld, whereby the court, in refusing to discharge the duty thus devolving upon it, exercises judicial functions erroneously. Though a void judgment can be collaterally assailed, the better rule, in our opinion, supports the principle that a writ of review will lie to cancel the entry of a void judgment when a court refuses to perform that duty. 4 Pl. & Pr. 49.

We conclude that the trial court had jurisdiction of the cause and that no error was committed in refusing to quash the writ on that ground.

The remaining question is whether or not the judgment entered by the county clerk against the defendants in the action, but who are plaintiffs herein, is void.

It will be remembered that an amended complaint had been filed in the action but that no time had been prescribed by the court in which an answer should have been filed. The statute regulating the practice in such cases is as follows: "If the complaint be amended, a copy thereof shall be served on the defendant or his attorney, and the defendant shall answer the same within such time as may be prescribed by the court; and if he omit to do so, the plaintiff may proceed to obtain judgment as in other cases of failure to answer." L. O. L. Sec. 70. Due service of the amended complaint had been admitted by defendants' counsel so that jurisdiction of the subject matter and of the parties had been secured. As no time had been fixed in which an answer should have been filed, the defendants were not in default. If judgment had been rendered against them by the court, instead of the clerk, it is quite probable that because they were not given all the time allowed by law to plead, the judgment would not have been a nullity or subject to collateral attack. Woodward v. Baker 10 Ore. 491; Altman v. School District 35 Ore. 85. Judgments in such cases, though considered irregular are not treated as void, on the ground that the parties being in court must take notice of all proceedings therein by which their interests are affected, in so far as the court determined from an inspection of the papers before it that the cause was ripe for judgment and any mistake in that particular constitutes only an error.

This principle can have no application to a county clerk in entering a default and judgment for, having no judicial power, he exercises only statutory authority and if he fails to observe the several requirements thereby imposed upon him or governing the proceedings, the judgment he attempts to enter is void. Kelly v. Van Austin, supra.

Believing the judgment, brought up to the circuit court for review, was void no error was committed in annulling the entry and in remanding the cause with directions to fix a time in which the answer should be filed. It follows that the judgment appealed from should be affirmed and it is so ordered.

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