JOHN A. MARSHALL BRICK COMPANY AND OTHERS (PLAINTIFFS) . . . . } APPELLANTS;

AND

THE YORK FARMERS COLONIZATION COMPANY (DEFENDANTS) . } RESPONDENTS.

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*Nov. 21, 22.
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*Feb. 19.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Mechanic's lien—Loan company—Agreement for sale—Advances for building—"Owner"—Request—Privity and consent—Mortgagee—R.S.O., [1914] *c.* 140, *ss.* 2 (1), 8 (3) *and* 14 (2)—" *Mechanics' Lien Act.*"

The owners of four lots of land in Toronto executed an agreement to sell them to one I. who was to make a cash deposit and undertake to build four houses on the lots, the vendors to advance $6,400 for building purposes. On completion of the houses and on receipt of the balance of price and amount of advances, the vendors to execute a deed of the lots. I. gave contracts for the building which was partly completed, and $3,400 was advanced by the vendors when I. became insolvent and the vendors, under the terms of their agreement, gave notice of forfeiture and took possession of the property. Prior to this liens had been filed for labour and materials supplied and the lien-holders brought action for enforcement thereof against the vendors.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 542), Davies and Brodeur JJ. dissenting, that the vendors were not owners of the property according to the definition of the term "owner" in section 2 (*c*) of the "Mechanics Lien Act" and, therefore, were not liable to pay for the labour and materials supplied for the building of the houses by I.

Per Anglin J.—To make the vendors "owners" because the work was done with their privity and consent a direct dealing between them and the materialmen was requisite and of this there was no evidence.

By section 14 (2) of said Act, the vendors, under the agreement for sale, became mortgagees of the land sold with their rights as such

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

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postponed to those of the lien-holders in respect to any "increased value" given to the land by erection of the houses thereon.

Held, that though they had refused it, at a former stage of the proceedings, the lien-holders should, if they wish, have a reference to permit of revision of their claims on the basis of the vendors being mortgagees, any amount found due to them on such reference to be set-off against the costs payable by them in the Appellate Division and on this appeal.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment of the official referee in favour of the appellants.

The respondents the York Farmers Colonization Company, Limited, are a land company. They sold to one Irving four lots on Edmund Avenue, Toronto, for $2,400, he paying a cash deposit of $120 and undertaking to erect four houses according to plans furnished by the vendors, the company to advance money for building purposes, and, when the houses were completed, deeds to be given to the purchaser on payment of the balance of the purchase price and re-payment of the advances with interest.

The property is under the "Land Titles Act," R.S.O. ch. 126, and the agreement was not registered.

Irving proceeded to build the houses and these appellants supplied labour and materials therefor. The appellants registered mechanics' liens against the property under the Act (R.S.O. 1914, ch. 140) and it is undisputed that they are now entitled to the liens as against Irving's interest in the property.

Irving became insolvent and the company exercised their right under their contract with him to serve notice of forfeiture. After the notice of forfeiture they took possession of the property and claim now

(1) 35 Ont. L.R. 542, *sub nom. Marshall Brick Co.* v. *Irving.*

to hold the houses free from any liability to the appellants under the mechanics' liens.

The houses when completed would have been worth about $2,400 each, that is to say $9,600, independently of the land. The respondent company advanced $3,400 to Irving under the agreement. Two of the houses were about finished, a third was roofed in and the walls of the fourth up to the joists, leaving about $3,000 still to be expended to complete all four.

The issue was tried before R. S. Neville Esquire, K.C., official referee, at Osgoode Hall, Toronto. He delivered judgment establishing the liens of these appellants as against the interests of both Irving and the York Farmers Colonization Company in the lands in question.

From this judgment the York Farmers Colonization Company appealed and the Second Appellate Division of the Supreme Court of Ontario reversed the judgment of the official referee, being of the opinion that the referee erred in finding that the liens of the appellants attached as against the interest of the respondent company in the property.

Section 6 of the Act (R.S.O. 1914, ch. 140) provides that:—

"Unless he signs an express agreement to the contrary * * * any person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing * * * any erection, building * * * for the *owner*, contractor, or sub-contractor shall by virtue thereof have a lien for the price of such work, service, or materials upon the erection, building, * * * and the and occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed,

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or upon which such materials are placed or furnished to be used."

And section 8 (1) provides that:—

"The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6."

"Owner" is defined by section 2 (*c*):—

"(*c*) 'Owner' shall extend to any person body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

(i) upon whose credit or

(ii) on whose behalf or

(iii) with whose privity and consent or

(iv) for whose direct benefit

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished."

Sections 8 (3) and 14 (2) of the Act are as follows:—

8. (3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge.

14. (2) Where there is an agreement for the purchase of land, and the purchase money or part thereof, is unpaid, and no conveyance has been made to the pur-

chaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

Raney K.C. and *C. Lorne Fraser* for the appellants. Respondents had an "interest" in this land and the terms of the agreement for sale respecting the building of houses amounted to a "request": *Orr* v. *Robertson*(1).

These terms also made it impossible for respondents to deny that the work was done with their privity and consent. See *Graham* v. *Williams*(2); *Blight* v. *Ray*(3); *West* v. *Elkins*(4); *Gearing* v. *Robinson*(5); *Orr* v. *Robertson*(1).

On the question of appellants' rights against the respondents as mortgagees see Thom Canadian Torrens System, page 164; *Richards* v. *Chamberlain*(6); *Hynes* v. *Smith*(7); *McVean* v. *Tiffin*(8); *McNamara* v. *Kirkland* (9); *Cook* v. *Koldoffsky* (10); *Charters* v. *McCracken* (11); *Rose* v. *Peterkin* (12); *Miller* v. *Duggan* (13).

B. N. Davis for the respondents. The appellants' lien is not superior to ours so far as the advances to Irving are concerned: *Cook* v. *Belshaw*(14); *Kennedy* v. *Haddow* (15).

Mere knowledge of the work being done and materials supplied is not "privity and consent." See

(1) 34 Ont. L.R. 147.
(2) 9 O.R. 458.
(3) 23 O.R. 415.
(4) 14 C.L.T. 49.
(5) 27 Ont. App. R. 364.
(6) 25 Gr. 402.
(7) 27 Gr. 150.
(8) 13 Ont. App. R. 1.
(9) 18 Ont. App. R. 271.
(10) 35 Ont. L.R. 555.
(11) 36 Ont. L.R. 260.
(12) 13 Can. S.C.R. 677.
(13) 21 Can. S.C.R. 33.
(14) 23 O.R. 545.
(15) 19 O.R. 240.

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The Chief Justice.

Graham v. *Williams*(1); *Gearing* v. *Robinson*(2); *Slattery* v. *Lillis*(3) at page 703; *Quinn* v. *Leathem*(4), at page 506.

THE CHIEF JUSTICE.—I do not dissent from the judgment dismissing this appeal reserving to the appellant the right to a reference under the conditions mentioned in Mr. Justice Anglin's notes.

DAVIES J. (dissenting)—This is an appeal from the judgment of the Second Appellate Division of Ontario which reversed that of the official referee before whom the case was tried, which latter judgment maintained the claim of the now appellants to a lien against the interest of the respondents in the lands in question as "owners" under the "Mechanics Lien Act," R.S.O., 1914, ch. 140.

The main question argued was whether the appellants were owners of the lands within the meaning of the word "owner" defined in the interpretation clause 2(*c*) of that Act.

Subsidiary questions were also raised and argued whether if the claimants were not such "owners" the "mortgage or other charge" which the respondents claimed to have as a prior claim to the appellants' lien was the balance of the purchase money of the lands sold by the respondents to one Irving which amounted to $2,280 or that sum plus $3,400 which they had actually advanced to Irving under the agreement with him for the building of four houses upon the lands sold to him, in all $5,680.

The facts are not in controversy. The respondents,

(1) 8 O.R. 478.
(2) 27 Ont. App. R. 364.
(3) 10 Ont. L.R. 697.
(4) [1901] A.C. 495.

the York Farmers Colonization Company, Limited, are a land company. They sold to one Irving four lots on Edmund Avenue, Toronto, for $2,400, he paying a cash deposit of $120 and undertaking to erect four houses according to plans furnished by the vendors, the company to advance money for building purposes, and, when the houses were completed, deeds to be given to the purchaser on payment of the balance of the purchase price and re-payment of the advances with interest.

The property is under the "Land Titles Act" and the agreement was not registered.

Irving proceeded to build the houses by a contractor, Campbell, and these appellants supplied labour and materials therefor. The appellants registered mechanics' liens against the property under the "Mechanics Lien Act" and it is undisputed that they are now entitled to liens as against Irving's interest, if any, in the property for the amount.

Irving became insolvent and the company exercised their right under their contract with him to serve notice of forfeiture. After the notice of forfeiture they took possession of the property and claim now to hold the houses free from any liability to the appellants under the "Mechanics Lien Act."

The houses if completed would have been worth about $2,400 each, that is to say $9,600, independently of the land. The respondent company advanced $3,400 to Irving under the agreement to build them. Two of the houses were about finished, a third was roofed in and the walls of the fourth up to the joists, leaving about $3,000 or more still to be expended to complete all four.

The agreement after witnessing that the vendors agreed to sell and the vendee to buy from them lots

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as described for $2,400 went on specially to provide for the building on each lot by the vendee of a solid brick house to be used for private residences only, and that the vendors should lend him $6,400 for the construction of the four houses in instalments as the work progressed, which was to be applied only to the construction of such houses and that the houses should be built according to plans and specifications dated and signed by the vendors.

Many very special stipulations were inserted for the protection of the vendors' interests and to secure that

> the houses should not be used for any purpose that might deteriorate the adjoining property

which I therefore assume was the vendors.' Time was declared to be of the essence of the contract and discontinuance of the work at any time for two weeks gave the vendors the right to take possession ,made the agreement "null and void" and forfeited to the vendor all moneys paid and improvements made thereunder.

I think it necessary to state these facts because in construing this "Mechanics Lien Act" and the rights of the different parties thereunder, it seems clear that "each case must be governed by its own facts." A few general principles have been laid down in the decided cases and accepted as the law, such as that

> mere knowledge of or consent to the work is not either a "request" or "privity and consent" within the meaning of the interpretation clause

and in the case of *Orr* v. *Robertson*(1), at page 148, Riddell J., in delivering the opinion of the Appeal Court, said:—

> While, to render the interest of an owner liable, the building, etc., must have been at his request, express or implied, there is no need that

(1) 34 Ont. L.R. 147.

this request be made or expressed to the contractor—if the owner request another to build etc., and that other proceeds to build, by himself or by an independent contractor or in whatever manner, the building being in pursuance of the request, the statute is satisfied. The taking of a contract from Hyland to build is a request within the meaning of the statute.

I think this statement of the law as to the construction of the statute a correct one.

Dealing with the main question then as to whether the respondents are under the facts proved "owners" of the land and buildings within the interpretation clause (*c*) I am not able to agree with the conclusions reached by the court of appeal that the respondents were not "owners" within that clause. That clause (*c*) reads as follows:—

(*c*) "Owner" shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

(i) upon whose credit or
(ii) on whose behalf or
(iii) with whose privity and consent or
(iv) for whose direct benefit

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

In the case before us it is not disputed that the respondents had an interest in the land. The dispute is whether there was a "request" and a "privity and consent" on the part of the respondents with respect to the work done on the buildings and the materials supplied for them for which the lien is sought.

I do not think, as I have said, a direct request is necessary from the owner to the workman or the materialman. Such a request must be one to be reasonably implied under the facts of each case: *Orr* v.

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Robertson(1), above cited, so decided and I agree with that construction of the statute. If that was not so the main purpose and object of the Act, namely the protection of these workmen or materialmen would be easily defeated. All that would be required would be the interposition of a third party between the real owner and the workman or materialman supplying the labour or the materials.

In the case now before us, therefore, I do not entertain any doubt on the facts as proved—alike on authority and on the construction of the Act apart from authority—that the work and materials for which a lien is sought to be established was done and materials supplied at the respondents' request. If that is so, I cannot find any difficulty in concluding also that they were done and supplied with the privity and consent of the respondents.

This is not a case of *mere knowledge* or *mere consent* on the part of the respondent company. The agreement they made with Irving to whom they sold the lot specially provided for the building of these four solid brick houses in accordance with the plans the company had prepared and which they required him to sign. It also provided for the advance to Irving of a substantial portion of the cost of the buildings and made very special provisions for the forfeiture, under certain circumstances of delay and otherwise, of all moneys paid by Irving to them and of all improvements made by Irving upon the lands. Under these forfeiture provisions the company acted and the referee finds that Irving's interest was determined and is gone and that the ownership of the land and buildings now belongs to the company.

(1) 34 Ont. L.R. 147.

These facts shew that the action of the company was not that of mere knowledge or mere consent to the work being done which the courts have held to be insufficient. The agreement with Irving to build the houses and to advance him a portion of the money necessary to do so was more than a mere request on their part that Irving should build. It bound him to build in accordance with plans and specifications provided by the vendors, respondents, and bound them to supply him with a substantial portion of the moneys necessary to enable him to carry out his contractual obligation—being careful, of course, to secure themselves by stipulations providing for time being of the essence of the contract, and for delay creating forfeiture and making the agreement null and void.

If the facts as proved in this case and the agreement under which the houses were partly built do not constitute a "request" under the statute, I am at a loss to know what facts would. It does seem to me, therefore, that not only was there a "request" to build, but there was necessarily involved in the agreement to build, the actual building, and the advances made by the respondent of the moneys they contracted to supply from time to time as the work progressed, the "privity and consent" also required by the section of the statute. It surely was not necessary that there should be direct contractual relations proved between the respondents and the lien claimants for the materials they supplied the contractor and the actual labour they performed. But the fair and reasonable inference from the proved facts is that there was alike such "privity" and "consent" of the respondents as satisfies the statute.

Having reached these conclusions, holding the respondents "owners" under para. (*c*) of the interpreta-

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tion clause of the Act, it is not necessary for me to deal with the other questions raised on the argument.

I would allow the appeal with costs and restore the judgment of the official referee.

DUFF J.—I concur in dismissing this appeal. I agree with the conclusions of Meredith C.J. and the reasons assigned therefor.

ANGLIN J.—Although the "Mechanics Lien Act" (R.S.O. ch. 140) in sec. 14 (2) expressly declares that an unpaid vendor who has not conveyed shall

for the purposes of this Act be deemed a mortgagee,

it seems reasonably clear that if he fulfils the requirements prescribed by the statutory definition of that term he may also be regarded as an "owner." I am not convinced, however, that the Appellate Division erred in holding that the respondent company was not an owner.

As an unpaid vendor the company was not an owner apart from the statutory definition. That definition sec. 2 (*c*) extends the meaning of "owner" to include a person

having any estate or interest in the land * * * at whose request and * * * with whose privity and consent * * * (the) work or services are performed or (the) materials are placed or furnished,

in respect of which the lien is claimed. Upon the authorities holding that the "request" may be implied, of which it is necessary to refer only to *Orr* v. *Robertson*(1), the contractual provision by which the respondent company required its purchaser to erect buildings on the land according to approved plans and specifications and within a defined period may have amounted

(1) 34 Ont. L.R. 147.

to a "request" under the statute, although an opinion to the contrary was expressed at the conclusion of the judgment delivered in this case by Mr. Justice Riddell (1). The learned judge's reasoning, however, rather points to an absence of the requisite "privity and consent."

While it is difficult if not impossible to assign to each of the three words "request," "privity" and "consent" a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in *Graham* v. *Williams*(2), and approved in *Gearing* v. *Robinson*(3), at page 371, that "privity and consent" involves

> something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged * * *. Mere knowledge of, or mere consent to, the work being done is not sufficient.

There is no evidence here of any direct dealing by the respondent company with the purchaser's contractor such as is necessary to establish the "privity" requisite to constitute the respondent company an "owner" within the definition of the "Mechanics Lien Act."

Failing to establish the respondent's interest as "owner," the appellants prefer a right to a lien under sec. 8 (3) of the Act upon "increased selling value." In making this claim they assert the position of the respondent company to be that of a mortgagee. In so doing they necessarily invoke the agreement for sale since it is as an unpaid vendor that the statute declares the respondent to be a mortgagee (sec. 14(2)). Invoking that agreement they must take it as a whole, including its provisions for advances to be made to

(1) 35 Ont. L.R., at pp. 551-2. (2) 8 O.R. 478; 9 O.R. 458.
(3) 27 Ont. App. R. 364.

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the purchaser secured by the stipulation for re-payment before conveyance. The priority of this "charge" on the land does not depend on registration but upon its existence as a charge before the lien arose: *Cook* v. *Belshaw*(1). Under sec. 14 (1) the mortgage or charge is to be regarded as a "prior mortgage" only in respect of payments or advances made before notice in writing or registration of the lien. To the extent to which the selling value of the property has been increased by the work or services performed or the materials furnished by the plaintiffs the company's interest as such prior mortgagee is subject to the plaintiffs' lien (sec. 8 (3)): *Patrick* v. *Walbourne*(2), at pages 225-6.

At the trial before the official referee the plaintiffs expressly abandoned this right to a lien upon increased selling value. They were, nevertheless, as a matter of grace, offered in the Appellate Division an opportunity to apply for

> a reference to permit of their claims being reviewed on the basis of the company being only prior mortgagees.

They failed to take advantage of the indulgence thus extended. In view of these facts they would have no ground for complaint if this branch of their appeal to this court were not entertained. But, taking all the circumstances of the case into account, I think the ends of justice will be best attained by allowing them, if so advised, even at this late date, to take a reference in the terms which I have quoted from the judgment of the learned Chief Justice of the Common Pleas.

The respondent is of course entitled to its costs of this appeal and these costs as well as the costs awarded them in the Appellate Division may be set off against

(1) 23 O.R. 545. (2) 27 O.R. 221.

any amounts for which the appellants may establish liens on the reference, should they take it.

BRODEUR J. (dissenting)—This appeal has reference to the application and construction of the "Mechanics and Wage-Earners Lien Act of Ontario" (R.S.O. 1914, ch. 140).

The appellants have established their claims and we have now to decide whether or not those claims affect the interests of the respondent company. According to sec. 8, sub-sec. 1, the lien shall attach upon the estate or interest of the "owner" in the property. We have then to find out whether the company should be considered an "owner."

The respondent company was the proprietor of the lands in question in this case and, on the 17th of July, 1914, it entered into an agreement with a man by the name of Irving by which the company agreed to sell and Irving agreed to buy the said lands for a sum of two thousand four hundred dollars ($2,400).

The agreement recited that Irving desired to build four houses on the lands and required to borrow money for that purpose, and the company agreed to lend him a sum of $6,400 which was to be advanced for the construction of the houses during the progress of the building operations. The agreement provided that the houses should be built according to certain plans and specifications.

It was agreed also that the work would begin on the 20th of July, 1914, and be completed in the month of November of the same year, and it was further stipulated that the company should pass a deed of the property within one month after the houses would be completed if Irving re-paid the company all the moneys advanced and the purchase price.

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It was also agreed that time would be of the essence of the contract and that if the work should, at any time, be discontinued for two weeks the company would have the right to take possession of the property and the agreement of sale would become null and void.

The agreements of sale are contemplated by the "Mechanics and Wage-Earners Lien Act," sec. 14, sub-sec. 2, which declares that

> Where there is an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

This is not, however, all the law on the matter; and, as was stated by the learned Chief Justice in the court below,

> that, however, does not prevent mortgagees from being more than mortgagees, they are "owners" if they come within the definition of that word contained in the interpretation clause of the Act.

The definition is contained in sec. 2, sub-sec. (*c*), which declares that:—

> "*Owner*" shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and
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> (i) upon whose credit or
> (ii) on whose behalf or
> (iii) with whose privity and consent or
> (iv) for whose direct benefit
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> work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

The question then to be determined is whether the building has been built at the request of the respondent company and with its privity and consent.

The company appears to be the proprietor of a

large number of vacant lots in the vicinity of Toronto and the form of agreement entered into in this case between the defendant company and Irving is one which has been in use by the company and its predecessors for many years. Instead of having those vacant lots built on by the company itself they make arrangements with some contractors, as they have done in this case, because Irving is a contractor and is so called in the deed, by which those contractors obligate themselves to build and if they fail to carry out their contract during a certain period of time then the buildings become the absolute property of the company. If, on the other hand, the contractor carries out his contract, builds the houses and reimburses the money which had been advanced by the company for their construction, and if he pays the price agreed upon for the sale of the land itself, then the contractor is entitled to a conveyance.

Those contracts of the respondent company had to be considered by the court in the unreported case of *Toronto Junction Co.* v. *Armstrong and Cook*. The learned referee tells us in his judgment that the case was tried before the late master in chambers and it is contended that the interest of the company was declared to be charged with the lien; but unfortunately this case is not reported, and it is contended, on the other side, that the judgment which has been rendered has not that effect.

It was decided in the case of *Orr* v. *Robertson*(1), that a contract similar in many respects to this one should be construed as constituting on the part of the respondent a request. If the company had simply agreed with Irving that it would advance to the latter the necessary money for erecting the buildings, then

(1) 34 Ont. L.R. 147.

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the relations would be those of mortgagor and mortgagee. But when Irving obligates himself towards the company to erect those buildings, then I would consider that the obligation contracted by Irving is such that he should be considered as having been requested by the company to erect the buildings and that the latter erected them with its privity and consent.

This case is distinguished from the case of *Graham* v. *Williams*(1), much relied upon by the respondents; because in that case the builder or the intended purchaser never obligated himself to build, it was purely and simply a case of the owner permitting his lessee to erect some buildings and to advance him some money. There was no formal obligation on the part of the contractor to build and the proprietor could not force the intended purchaser to build. It is a very different case from this one, where the contractor has bound himself to build. The company was entitled to retain the building if the contractor had not finished it within a certain time.

The case of *Garing* v. *Hunt*(2), has also been cited on behalf of the respondents.

That case is also, in some respects, based upon a contract very similar to the contract which we have to examine in the present case, but the relations between the parties were those of lessor and lessee, and Falconbridge, J. who rendered the judgment, relied on the fact that a formal consent in writing had not been given, as provided by sec. 5, sub-section 2, of the Act which declared that in cases where

> the estate or interest charged by the lien is leasehold, the fee simple may also with the consent of the owner thereof be subject to such charge, provided such consent is testified by the signature of such owner upon the claim of lien at the time of the registering thereof and duly verified.

(1) 8 Ont. L.R. 478. (2) 27 Ont. R. 149.

That section cannot be invoked in the present case. Irving was not the lessee of the York Farmers Company but an intending purchaser.

There is also the case of *Gearing* v. *Robertson*(1), which is invoked by the respondents, where the parties were lessors and lessees; and Mr. Shepley, who argued the case for the lessors, claimed also that there was no liability because under section 2 of sub-section 7 there was no consent in writing.

In the case of *Gearing* v. *Robertson*(1), the lease also contained a clause that the lessee was allowed to make some changes in the intended structure of the building, but the lessee never bound himself, as in the present case, to make those improvements. It was simply stated that if the improvements were made the lessee would have the right to be reimbursed at the expiration of the lease.

The request certainly did not exist in that case.

The contract that we have to deal with in this case is a very different one from those which had to be construed in the last three cases relied upon by the respondent and then those cases have to be distinguished from the present case.

It may be urged that the terms of this contract do not contain any clause by which a formal request has been made by the proprietor to build houses on his property for the contract declared that the intended purchaser desires to build and much stress is laid upon the word "desires."

But the contract has to be construed by all its clauses and if the contract is made in such a way as to defeat the "Mechanics' Lien Act," I should say that

(1) 27 Ont. App R. 364.

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such an agreement should be held against public order (sec. 6).

I have come to the conclusion that the respondent company should be considered an "owner" under the provisions of the "Mechanics' Lien Act," and that its interest should be charged with the lien claimed by the appellant.

The appeal should be allowed with costs of this court and of the court below.

Appeal dismissed with costs.

Solicitor for the appellants: *C. Lorne Fraser.*
Solicitors for the respondents: *Cook & Gilchrist.*