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THE CLARKSON COMPANY LIMITED, TRUSTEE IN BANKRUPTCY OF L. DI CECCO COMPANY LIMITED, and THE SISTERS OF ST. JOSEPH FOR THE DIOCESE OF TORONTO IN UPPER CANADA (*Defendants*) .....APPELLANTS;

AND

ACE LUMBER LIMITED and DANFORD LUMBER COMPANY LIMITED, carrying on business under the firm name of CADILLAC LUMBER (*Plaintiffs*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Construction equipment supplied on rental basis—Whether liens created in respect of rentals charged—The Mechanics' Lien Act, R.S.O. 1960, c. 233, s. 5.

A subcontractor, engaged to erect form work for concrete floors, columns and other portions of specific buildings on lands owned by the Sisters of St. Joseph, contracted with A Ltd. and D Ltd. for the rental of certain construction equipment. The subcontractor later became bankrupt, and, in a mechanics' lien action, A Ltd. and D Ltd. filed claims in respect of the rentals charged for the said equipment. These claims were rejected by the master but were allowed on appeal to the Court of Appeal by a majority decision. An appeal was then brought to this Court.

Held: The appeal should be allowed.

While *The Mechanics' Lien Act,* R.S.O. 1960, c. 233, may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien claimant is a person to whom a lien is given by it.

The submission that the price of the rental of the equipment was the proper subject-matter of a lien within the meaning of s. 5 of the Act on the ground that such rental constituted "the performance of a service" in respect of the constructing and erecting of the buildings in question, or alternatively, that it constituted the furnishing of materials used in the construction and erection thereof, was rejected. As the equipment was neither furnished for the purpose of being incorporated nor incorporated into the finished structure of the buildings and as it was not consumed in the construction process, it could not be said to have been "material" furnished "to be used in the constructing or erecting of the building" within the meaning of the section. Also, the lien created by s. 5(1) in respect of "materials" furnished was a lien for the "price of" such "materials". This was a different thing from the price of the rental of materials and it was illogical to suppose that the legislature intended to create a lien for the "price" of the materials in favour of a person who never parted with title to them, who supplied them on the understanding that they would be returned and to whom they were in fact returned.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

The word "performs" in s. 5 was to be taken as connoting some active participation in the performance of the service on the part of the lien claimant. Having regard to the rule of construction applicable in the circumstances, the respondents, by merely making their equipment available at a fixed rental, could not be said to be persons who performed any service upon or in respect of the building within the meaning of the section.

Timber Structures v. C.W.S. Grinding & Machine Works, 229 P. 2d 623, referred to; *Crowell Bros. Ltd. v. Maritime Minerals Ltd. et al.* (1940), 15 M.P.R. 39, approved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from the report of Bristow, Master, in a mechanics' lien action. Appeal allowed.

C. A. Thompson, Q.C., and *J. W. Craig*, for the defendants, appellants.

R. E. Shibley and *J. W. McCutcheon*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] (Kelly J.A. dissenting) allowing the mechanics' lien claims asserted in this action by Acrow (Canada) Limited (hereinafter referred to as Acrow) and Dell Construction Company Limited (hereinafter referred to as Dell) in the sums of $10,380.29 and $20,632.59 respectively, being the price of the renting of certain construction equipment to L. Di Cecco Company Limited for the purpose of facilitating the carrying out by the latter company of a subcontract to erect form work for concrete floors, columns and other portions of certain buildings known as the House of Providence, situate on lands owned by the Sisters of St. Joseph.

The facts are not in dispute and it is apparent that title to the equipment in question remained in Acrow and Dell respectively, that it was for the most part delivered to the job by the Di Cecco Company and was always returned by that company or its trustees in bankruptcy after use. All of the equipment in question was furnished to the Di Cecco Company on a straight rental basis and no personnel of either Acrow or Dell were employed in connection with its installation or employment.

[1] [1962] O.R. 748, 33 D.L.R. (2d) 701.

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The determination of this appeal depends upon the true construction to be placed upon s. 5 of *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, and specifically upon whether that section is to be so construed as to create a lien in respect of the rentals charged for the said equipment by the two lien claimants.

The material provisions of s. 5 of *The Mechanics' Lien Act* read as follows:

> (1) 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, erecting, fitting, altering, improving or repairing of any . . . building . . . for any owner, contractor, or subcontractor, by virtue thereof has a lien for the price of the work, service or materials upon the estate or interest of the owner in the . . . building . . . and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are placed or furnished to be used, . . . and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent is good and sufficient delivery for the purpose of this Act, . . .
>
> (2) The lien given by subsection 1 attaches to the land as therein set out where the materials delivered to be used are incorporated into the buildings, . . . on the land, notwithstanding that the materials may not have been delivered in strict accordance with subsection 1.

It was submitted on behalf of the respondents in this Court as it had been in the Court of Appeal for Ontario that the price of the rental of the said equipment was the proper subject-matter of a lien within the meaning of this section on the ground that such rental constituted "the performance of a service" in respect of the constructing and erecting of the buildings in question, or alternatively, that it constituted the furnishing of materials used in the construction and erection thereof.

All the judges of the Court of Appeal agreed with Roach J.A. that as the equipment here in question was neither furnished for the purpose of being incorporated nor incorporated into the finished structure of the buildings and as it was not consumed in the construction process, it could not be said to have been "material" furnished "to be used in the constructing or erecting of the building" within the meaning of the said s. 5. I agree with the reasoning and conclusion of Mr. Justice Roach in this regard. As that learned judge has also observed, the lien created by s. 5(1) in respect of "materials" furnished is a lien for the "price

of" such "materials". This is a different thing from the price of the rental of materials and it would appear to me that it would be illogical to suppose that the legislature intended to create a lien for the "price" of the materials themselves in favour of a person who never parted with title to them, who supplied them on the understanding that they would be returned and to whom they were in fact returned.

The respondents' contention that the rental of this equipment constituted the "performance of a service" within the meaning of the said s. 5 was however upheld by the Court of Appeal and Roach J.A., in the course of the reasons for judgment which he delivered on behalf of the majority of that Court, having expressed the view that the phrase "work or service" as employed in that section is disjunctive and that "the 'performance of service' must therefore mean the doing of something exclusive of 'work' or the placing or furnishing of materials to be used etcetera that enhances the value of the land", went on to say that:

> The words "performance of service" may not be the most apt words that the legislature could have used to express its intention, but in the context in which they have been used I think their meaning is sufficiently plain. They must be given a meaning consistent with the spirit of the Act. In the context in which they have been used I interpret them as meaning to supply aid or an essential need in the construction process.

After observing that the employment of the form of equipment supplied by the lien claimants was essential to the modern type of construction involved in the contract in question and that until recent years the function performed by that equipment involved the fabrication of forms on the job, the labour and material for which had the protection and security of the Act, Mr. Justice Roach concluded that "those who supply the service under this modern technique are equally entitled to that protection and security". He then proceeded to quote the provisions of s. 4 of *The Interpretation Act*, R.S.O. 1960, c. 191, to the effect that "the law shall be considered as always speaking," etc. and to say:

> To deny to these appellants the same security under the Act as was given to those who applied the earlier technique in the construction industry would be wrong and quite contrary to the spirit and purpose of the Act. In this connection I adopt the language of Brown J. in *Johnson v. Starrett* (1914), 127 Minn. 138 at 142 citing *Schaghticoke Powder Co. v. Greenwich and Johnsville Ry. Co.*, 183 N.Y. 306 where he said ". . . in the construction of statutes their language must be adapted to changing conditions brought about by improved methods and the progress of the inventive arts".

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It appears to me that this latter argument loses much of its force when it is remembered that *The Mechanics' Lien Act* in question was revised by the Legislature of Ontario in the same year (1960) in which the equipment was rented. This is not a question of adapting the language of an old statute to meet new conditions, but rather one of determining the intention of the legislature with respect to a building practice which was currently employed at the time when the statute was enacted.

The above excerpts from the reasons for judgment of the majority of the Court of Appeal indicate to me that the conclusion there reached is predicated in large measure on the assumption that the provisions of *The Mechanics' Lien Act* which describe and delimit the classes of persons entitled to a lien thereunder are to be liberally construed and that their language is to be adapted to meet the circumstances here disclosed.

With the greatest respect, I am, however, of opinion that the proper approach to the interpretation of this statute is expressed in the dissenting opinion of Kelly J.A. where he says that:

> The lien commonly known as the mechanics' lien was unknown to the common law and owes its existence in Ontario to a series of statutes, the latest of which is R.S.O. 1960, c. 233. It constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act, and grants to one class of creditors a security or preference not enjoyed by all creditors of the same debtor; accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.

The same view was adopted in the unanimous opinion of the Supreme Court of Oregon in *Timber Structures v. C.W.S. Grinding & Machine Works*[1], where it was said:

> We agree with the defendant that the right to a lien is purely statutory and a claimant to such a lien must in the first instance, bring himself clearly within the terms of the statute. The statute is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the lien; but when the claimant's right has been clearly established, the law will be liberally interpreted toward accomplishing the purposes of its enactment.

[1] 229 P. 2d 623 at 629.

The words "perform" and "service" are both susceptible of a variety of meanings according to the context in which they are employed and as has been indicated, if the statutory language is liberally construed and selected meanings are assigned to each of these words in order that they may be adapted to the circumstances, it may then be logical to construe the phrase "any person who performs any . . . service upon or in respect of . . . constructing any building" as including a person who rents non-consumable equipment for temporary use to facilitate the building's construction. In my view, however, different considerations apply to the strict construction of a statute which creates a lien, on the one hand, for any person who "performs any work or service" and on the other hand for any person who "furnishes any material". Even if it were accepted that the presence of the equipment at the building site in itself constituted a "service upon or in respect of . . . constructing" the building it is nevertheless my view that the words "furnishes" and "performs" as they occur in s. 5 of the Act must be given separate meanings and that the latter word must be taken as connoting some active participation in the performance of the service on the part of the lien claimant. Having regard to the rule of construction, which I consider to be applicable under the circumstances, I do not think that by merely making their equipment available at a fixed rental, the respondents can be said to be persons who performed any service upon or in respect of the building within the meaning of the section.

None of the cases so thoroughly analyzed in the Court of Appeal appears to me to constitute any direct authority for the proposition that the provisions of s. 5 of the Act or any equivalent statutory provisions create a lien for "services" in respect of the furnishing of equipment alone on a straight rental basis as in the present case. On the other hand, in the case of *Crowell Bros. Ltd. v. Maritime Minerals Ltd. et al.*[1], the Supreme Court of Nova Scotia, construing statutory language which was substantially the same as that with which we are here concerned, concluded that no lien under the heading of service could arise for the rental of a drill sharpener employed in sharpening tools used in

[1] (1940), 15 M.P.R. 39, 2 D.L.R. 472.

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the actual making of a mine. It appears to me that Doull J., who rendered the decision of that Court, was correct in adopting the view that:

> ...unless expressly so provided by statute, no lien can be acquired for the value or use of tools, machinery or appliances furnished or loaned for the purpose of facilitating the work where they remain the property of the contractor and are not consumed in their use but remain capable of use in some other construction or improvement work.

It is true that this language was adopted by Mr. Justice Doull from the resumé of American cases contained in Corpus Juris, vol. 40 at p. 86, but it seems to me to have been well applied to the statute which he had before him and that it applies with equal force to the *Mechanics' Lien Act* of Ontario.

As has been indicated, the practice of renting construction equipment appears to have been current in the construction business at the time when *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, was enacted and it seems to me that as the legislature at that time made no express provision for the inclusion of the renters of such equipment amongst those persons entitled to a mechanics' lien, it does not now lie with the Courts to create such a lien by adapting the statutory language that was used so as to accomplish that purpose.

For these reasons, as well as for those contained in the dissenting opinion of Kelly J.A., I would allow this appeal, set aside the order of the Court of Appeal for Ontario and direct that the report of the learned master from which the appeal was taken to that Court be restored.

The appellants will have the costs of this appeal and of the appeal to the Court of Appeal for Ontario.

Appeal allowed, order of the Court of Appeal for Ontario set aside and report of the Master restored.

Solicitors for the appellant, The Clarkson Co. Ltd.: Aylesworth, Garden, Thompson & Denison, Toronto.

Solicitors for the appellants, The Sisters of St. Joseph: T. A. King, Toronto.

Solicitors for the respondent, Acrow (Canada) Ltd.: White, Bristol, Beck & Phipps, Toronto.

Solicitors for the respondent, Dell Construction Co. Ltd.: Lorenzetti, Mariani & Wolfe, Toronto.