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Royal Audrey Backus v. Gus S. Hooten and Ella H. Hooten : Brief of Respondent

Utah Supreme Court

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Cline, Wilson & Cline; Attorneys for Appellant;

Durham Morris, Esq.; Attorney for Respondents;

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In the Supreme Court of the State of Utah

ROYAL AUDREY BACKUS,
Plaintiff and Appellant,

vs.

BUS S. HOOTEN and ELLA H.
HOOTEN,
Defendants and Respondents.

Case No. 8375

RESPONDENT'S BRIEF

On Appeal From The District Court Of The Fifth
Judicial District Of The State Of Utah,
In And For Beaver County.
Hon. Will L. Hoyt, Judge

Cline, Wilson & Cline
Attorneys for Appellant

Durham Morris
Attorney for Respondents

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Respondents agree with the statement of the case set forth in appellant's brief, with the exception that respondents contend that there are other parts of the plaintiff's complaint in addition to Paragraph 9, referred to in the last paragraph of page one of appellant's brief, which should not be taken as true in passing on respondents' motion to dismiss, namely, such allegations as are contained in the last five lines of Paragraph 4 of plaintiff's complaint beginning with the word "and" in the fifth line of said paragraph and the allegations contained in the last six lines of Paragraph 5 of plaintiff's complaint beginning with the word "believing" in the fifth line. These allegations are in the nature of beliefs

or conclusions of the plaintiff, not facts. Only allegations of fact well pleaded in the complaint must be taken as true in ruling on a pleading attacking the sufficiency of the complaint to state a cause of action. STATE EX REL STATE TAX COMMISSION OF UTAH vs. EVANS, COUNTY TREASURER OF WEBER COUNTY, - 6 P. 2d 161, 79 Utah 370; PLATZ v. INTERNATIONAL SMELTING CO. - 213 P. 187, 61 Utah 342.

STATEMENT OF POINTS RELIED UPON BY RESPONDENTS

It is clear from the language of the complaint that the contract entered into between the contractor, Busby, and the land owners, respondents, was a contract for the leveling of land for agricultural purposes and that the appellant furnished to the contractor only machinery and equipment used in leveling the land for agricultural purposes.

Respondents contend that the complaint does not state a claim upon which relief can be granted for the following reasons:

FIRST: That the contract pleaded, between the contractor, Busby, and the respondents, landowners, namely, a contract for leveling land for agricultural purposes, is not a contract falling within the provisions of Section 14-2-1 U. C. A. 1953, requiring "The owner of any interest in land entering into a contract involving \$500.00 or more for the construction, addition to, or alteration or repair of any building, structure or improvement upon land," to take out a bond "conditional for the faithful performance of the contract and prompt payment for materials furnished and labor performed under the contract." (Underlining ours).

SECOND: That Appellant by hiring machinery and equipment to the contractor, Busby, to be used by him in

leveling land for agricultural purposes, did not “furnish material or perform labor” in carrying out the contractor - landowners contract as contemplated by sections 14-2-1 and 14-2-2 U. C. A. 1953, and hence these sections do not impose any personal liability on the landowners, respondents, to pay the rental value of the such land-leveling machinery and equipment furnished to the contractor. (Underlining ours).

ARGUMENT

1. RULES OF STATUTORY CONSTRUCTION.

A. THE RIGHTS OF CLAIMANTS UNDER MECHANICS LIEN LAW STATUTES AND PRIVATE CONTRACTORS BOND STATUTES ARE PURELY STATUTORY AND THESE STATUTES CANNOT BE EXTENDED TO SITUATIONS OR PERSONS NOT FALLING WITHIN THEIR TERMS.

In support of this rule see: AMERICAN TANK & EQUIPMENT CO. V. T. E. WIGGINS, INC. ET AL, 42 P. 2d 115 (okl.), holding:

1. Mechanics' liens are in derogation of common law and exist solely by positive statute, which courts should construe and enforce as remedial acts, but which cannot to be extended to meet cases not within their scope.

Also see the authorities cited under subdivision “D” of Rules of Statutory construction..

B. THE LEGISLATIVE INTENT OF A STATUTE IS TO BE DETERMINED FROM THE WHOLE AND EVERY PART OF SUCH STATUTE.

BIRD & JEX CO. v. FUNK et al, 85 P. 2d 831, 96 Utah 450, holding: 4. Legislative intent and purposes in enacting a statute is to be deduced from the whole and every part of the statute taken together.

Hence in determining whether a landowner who enters into a contract for the leveling of his land for agri-

cultural purposes falls within the burdens of the Private Contractor Bond Statutes Sections 14-2-1 and 14-2-2 U. C. A. 1953 or whether a claimant who rented machinery to the land-leveling contractor falls within the benefits of these statutes, it is not a matter of trying to decide what the terms "or improvement upon land" and the terms "material furnished or labor performed under the contract" taken alone mean. These terms must be construed with the language which precedes and that which follows, the entire language of these statutes.

C. WHERE GENERAL WORDS FOLLOW AN ENUMERATION OF SPECIFIC SITUATIONS OR THINGS, SUCH GENERAL WORDS ARE HELD AS APPLYING ONLY TO SITUATIONS OR THINGS OF THE SAME GENERAL KIND OR CLASS AS THOSE SPECIFICALLY MENTIONED.

In support of this rule see: YOUNG v. SHRIVER et al, 206 P. 99 (cal.); HOWE v. MYERS, 162 P. 100 (Wash.).

Under this rule the general terms "or improvement upon land" used in section 14-2-1 U. C. A. 1953, should be construed as having the same general meaning as the specific situations or things preceding them, namely "for the construction, addition to, or alteration or repair of, any building, structure" upon land. The statute relates to buildings or structures upon land. It does not relate to situations or things or processes which constitute mere agricultural betterments of the land, but which do not relate to the same classes or kinds of processes as those specifically mentioned.

The general words "or improvement upon land" which follow the specific cases and situations expressed in the statute are restrained by words of specific enumeration preceding these general terms, namely, by the words "for the construction, addition to, or alteration or repair of any building, structure" and by the general scope and purpose declared in the entire section. With-

out limiting the scope of the enactment to the objects which were intended as determined by fairly construing the statute in its entirety, its meaning might be extended to include every improvement of, or betterment to land, which clearly was never intended. *PILLOW v. KELLY* et al, 296 S W 11 (Tenn.)

D. MECHANICS LIEN STATUTES AND PRIVATE CONTRACTORS BOND STATUTES SHOULD NOT BE LIBERALLY CONSTRUED AGAINST LANDOWNER TO BRING HIM WITHIN THE BURDENS OR LIBERALLY CONSTRUED IN FAVOR OF CLAIMANT TO BRING HIM WITHIN THE BENEFITS, OF THESE STATUTES.

It is contended in appellant's brief that the statutes relied upon by appellant, sections 14-2-1 and 14-2-2 U.C.A. 1953, should be liberally construed against the landowners, respondents, and in favor of claimant, in an effort to bring the landowners within the burdens of these statutes, and in an effort to bring claimant within the benefits of these statutes. Respondents contend that there is no such rule requiring liberal construction of these statutes against landowners in an effort to bring them within the burdens of these statutes, who, without liberal construction against them do not fall within the scope of such statutes, or requiring a liberal construction in favor of claimants, who except for the application of liberal construction in their favor would not fall within the benefits of such statutes.

None of the cases cited in appellant's brief hold that the statutes under consideration here or similar statutes should be liberally construed against the landowner in an effort to bring him within the language of the statutes or in favor of claimant to bring him within the benefits of such statutes. None of these cases involved the question of what type of improvement falls within the statutes or what type or kind of items furnished fall within the terms "performed labor" or "furnished materials."

The only point decided by the case of RIO GRANDE LUMBER CO v. DARKE et al, 167 P. 241, 50 Utah 114, quoted from in appellant's brief P. 10 as supporting liberal construction against landowners, was that Chapter 91 Laws of Utah 1915, which was a forerunner of Section 14-2-1 U.C.A. 1953, was constitutional. No question was raised or decided as to whether the statutes should be liberally construed against a landowner in an effort to bring him within the terms of the statute. In this case respondents furnished building materials which went into the building, and hence both the landowner and the claimant clearly fell within the scope of the statute. The language from this case quoted in appellant's brief was mere "loose talk" and did not relate to liberal construction either for or against the landowner or for or against the claimant, as no such point was involved in the case.

The only point decided by the case of LIBERTY COAL & LUMBER CO. v. SNOW, 178 P. 341, 53 Utah 298, (quoted from in appellant's brief P. 10) was that under Laws 1915, Chapter 91, a son, owner of land, who agreed with father that later should cause to be erected thereon, in return for use of land for indefinite period, a building worth from \$1,000. to \$1,100. was under duty to obtain from builder, or to require his father to obtain, bond securing payment for material furnished, in default of which he himself was personally liable to materialmen. The court held that the agreement between the son, landowner, and the father, contractor, providing for the building of a building costing over \$500. clearly fell within the statute and that plaintiff who furnished materials which went into the house also clearly fell within the provisions of the statute. No question of liberal construction to bring the landowner within the provisions

of the statute was involved. The structure built by the contractor was a dwelling house and claimant had furnished building materials which went into the house.

The statute construed in the case of MELLON v. VONDOR-HORST BROS. et al, 140 P. 130, 44 Utah 300, quoted from in appellant's brief P. 11, was an entirely different statute than the statutes involved in our case. The statute relied upon by appellant was a statute provided that any person who had furnished materials or had performed labor for a contractor in the construction of any public building, may at any time before the contract price has been fully paid, bring an action against the contractor and the public body for the recovery of the amount due, and may obtain a judgment against both the contractor and the public body to the extent of reaching any funds in the hands of the public body due to the contractor. There was no question but what the appellant had performed labor and furnished materials in the construction of the public building, which brought claimant clearly within the statute. The court held that appellant was clearly entitled under the statute to reach the funds and was not required to obtain personal service on the contractor before reaching the funds. The language quoted about liberal construction has no application to our case.

ELWELL v. MORROW et al, 78 p. 605, 28 Utah 278, quoted in appellant's brief P. 12 as favoring liberal construction, likewise involved an entirely different point than is raised in our case. The question in the Elwell case was whether intervener had waived his lien by not filing and proving his lien within the time specified in the notice which was published as required by statute (before Feb. 20, 1903). The court held that claimant, being an original contractor, had 60 days after the completion of his contract in which to file for record his

claim for lien, and that he could not be deprived of this right by respondent Elwell arbitrarily fixing a date in his published notice requiring lienholders not parties to the suit to file their liens in court on a date before the expiration of the 60 day period. The items furnished, building materials, and the structure built, a dwelling house, clearly fell within the scope of the statute and there was no necessity for invoking a liberal construction of the statute against the landlord to bring him within the burdens or in favor of the claimant to bring him within the benefits of the statute.

Not one of the cases cited, quoted from, or discussed in Appellant's Brief from pages 13 to 19, both inclusive, as favoring liberal construction, involved the construction of either a Mechanics Lien Law Statutes or a Private Contractor's Bond Statute or a Public Contractor's Bond Statute. Every one of these cases involved the question of the liability of a surety company under a surety bond, and involved the construction of the surety bond in each case. The statements made in these cases about liberal construction all related to the rule to be applied in the construction of surety bonds. Certainly, a surety bond, a contract, written, worded and issued by a surety for hire should be liberally construed against the surety company and in favor of a third party claimant under the bond. Quite a different rule of construction prevails in construing a surety bond in an action against the surety company, than prevails when construing either a mechanic's lien law statute or a private contractor's bond statute, when attempting to determine what burdens are imposed by the statute upon the landowner and what third party claimants can claim benefits under such statutes. Such statutes are not liberally construed against the landowner and in favor of the claimant when

deciding what contracts fall within the burdens of the statutes and what claimants fall within the benefits of such statutes, as is hereinafter more fully pointed out.

Why should Sections 14-2-1 and 14-2-2 U.C.A. 1953, be liberally construed against landowners, in respondents situation, in an effort to bring them within the burdens of these statutes. Respondents had no part in hiring the land-leveling equipment from appellant—from all that appears in the Complaint respondents knew nothing of the machinery and equipment used by the contractor having been hired — this was a deal entirely between the land-leveling contractor and appellant. Appellant has a cause of action against Busby, the contractor, with whom appellant dealt and doubtless originally intended to look to, for the contract price or the rental value of the machinery and equipment. Why should appellant not be required to look to the person with whom appellant dealt? Respondents were legally required to pay and have paid the land-leveling contractor, Busby, the full contract price for the leveling of their land. If the statutes are now liberally construed (stretched to the breaking point) to bring respondents within the burdens of the statutes respondents will have to pay twice for the leveling of their lands. Most farmers have difficulty in paying once for the leveling of their lands for agricultural purposes, and for other necessary agricultural betterments of their lands, and should not be required to pay twice. What are the equities against respondents in our case which demand a liberal construction of these statutes against them? And what equities are there in our case that require that these statutes be liberally construed in favor of appellant in an effort to bring appellant within the benefits of the statutes? There are none.

In support of the rule designated D above, that Mechanics' Lien Statutes and Private Contractor's Bond Statutes should not be liberally construed against a landowner to bring him within the burdens of these statutes

or should not be liberally construed in favor of a claimant to bring him within the benefits or scope of these statutes, respondents submit the following authorities:

NANZ et al v. CUMBERLAND GAP PARKS CO., S. W. 999 (TENN.)

1. The rule that mechanics' lien statutes are to be liberally construed does not extend to the determination of what persons are entitled to liens thereunder, to which matter a statute can not be extended by construction.

In this case the court said: "We think the statue refers to erections, structures, machinery, and buildings—things constructed upon the land—and not the enriching of the soil and beautifying the grounds by planting flowers, shrubs and trees upon it."

PHILLIPS v. GRAVES, 9 P. 2d 490 (Oregon)

5. Mechanics' lien statutes are strictly construed, especially in determining beneficiaries.

6. One claiming mechanic's lien must prove that he is within group mentioned in statutes as entitled thereto.

TIMBER STRUCTURES, INC. v. C. W. S. GRINDING & MACHINE WORKS, 229 P. 2d 623 (Oregon).

11. One claiming a mechanic's lien must, in the first instance, bring himself clearly within the terms of statutes creating lien.

12. The Mechanics' Lien Statute is strictly construed as to persons entitled to its benefits and as to procedure necessary to perfect lien, but when claimant's right has been clearly established the law will be liberally interpreted to accomplish purposes of its enactment.

BELL BROS. & CO., INC. v. ARNOLD et al. - 68 SW 2d 958 (Tenn.)

3. Mechanic's lien, being purely statutory, is not liberally construed to be enforceable against persons not enumerated in statute.

IN RE AMERICAN LIME CO. - 201 FED. 433, at PAGE 435 it was said: "(2) It is well settled, however,

that while this statute is to be liberally construed in reference to the property to which the lien attaches, only those persons enumerated and embraced in the statute are to be held entitled to the lien and that no persons are to be included under its provisions unless they make it clearly appear that they are so entitled, without a strained construction of the statute."

ANDERSON et al, v. CHAMBLISS et al, 262 P. 2d 298 (Oregon)

3. Because the right to a lien is purely statutory, a claimant to such a lien must in the first instance bring himself clearly within terms of Mechanics' Lien Law.

4. The Mechanics' Lien Law is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the lien.

6. When claimant's right to mechanics' lien has been clearly established, Mechanics' Lien Law will be liberally interpreted toward accomplishing the purpose of its enactment.

RICHARDSON v. LANIUS, 263 SW 799 (Tenn.)

6. Mechanic's liens statutes are strictly construed against those seeking to come within them, and liberally construed as to inclusion of property and subjecting it to lien, but are not given a strained construction to bring one within their provisions.

PILLOW v. KELLY et al. - 296 SW 11 (Tenn.)

1. The mechanic's lien statute (Shannon's Code Sec. 3531) protects those embraced within its terms, and cannot be extended by construction.

2. Court cannot extend benefit of mechanic's lien statute (Shannon's Code Sec. 3531) to either persons or objects not embraced within its terms, and in determining its breadth and scope must be guided both by words and context.

II. A CONTRACT FOR THE LEVELING OF LAND FOR AGRICULTURAL PURPOSES DOES NOT FALL WITHIN THE PROVISIONS OF SECTION 14-2-1 U.C.A. 1953

It is important to keep in mind that the land leveling to be done under the alleged contract between respondents, landowners, and the contractor, Busby, was the leveling of land for agricultural purposes. The land leveling called for by the contract was not incidental to or a part of the process of the construction of any building or structure upon the land. Our case is not to be confused with excavations or the moving of dirt involved in the digging of a basement or the moving of dirt or the breaking of land in connection with the building of a building or structure upon land, as these operations are as much a part of the process of building a building or structure as the building of the roof.

We are confronted with the question, does the statute 14-2-1 U.C.A. 1953, apply to a contract calling for the mere moving of the soil, a contract for the leveling of land for agricultural purposes.

In deciding this question it must be kept in mind that when deciding who falls within the burdens and the benefits of Mechanics' Lien Statutes and Private Contractors' Bond Statutes, such statutes should not be extended by construction and should not be liberally construed against a landowner, in an effort to bring him within the burdens of the statute, or be liberally construed in favor of a claimant in an effort to bring him within the benefits of such statutes.

We must also keep in mind that the words "or improvement upon land" must be construed in connection with the words which precede them and when these general terms are construed in connection with the specific enumeration which precedes them, namely, "for the construction, addition to, or alteration or repair of any

building, structure" it is clear that these general terms apply to the same class or kind as those specifically mentioned which relate to buildings or structures, and that these general terms do not apply to agricultural processes or agricultural betterments, such as the railing of brush, or the removal of trees, or the first breaking of the land, or the hauling of manure or the application of other fertilizers to the land, or to the mere moving of dirt, having no connection with the building of any building or structure, or the leveling of land for agricultural purposes, or to the planting and cultivating of shrubs and orchards, or to the planting and cultivating of perennial leguminous crops such as alfalfa, and similar "agricultural betterments" or "improvements" of or to the land and which admittedly enhance the value of the land but which clearly do not fall within the classes of improvements or structures upon the land specifically enumerated in the wording preceding the general terms "or improvement upon land."

In support of the rule that these and similar agricultural processes, or agricultural betterments or improvements do not fall within the scope of the Utah statutes and similar statutes, respondents submit the following authorities:

YOUNG v. SHRIVER—206 P. 99, 56 Cal. App 653, held that a mechanics' lien does not lie for the plowing and breaking of farm lands for the first time, even under a statute giving a lien, "to any one who grades, fills-in or otherwise improves any lot or tract of land, or the street or sidewalk adjoining the same, or who makes any improvements in connection therewith." The statute involved was a much more favorable statute to the claimant than is our statute.

In this case the court said: "It seems to us that there are substantial reasons why a lien should not lie for labor performed in preparing lands for use for agricultural pur-

poses in any case. If a lien were allowable for plowing the land, by analogy a lien would be allowable for labor performed in fertilizing and cultivating and planting it to crops or in harvesting the crops or any other labor necessarily incident to the business of farming or of fruit raising or any other purpose to which large bodies of agricultural lands may be adapted and put."

BROWN v. WYMAN and another, 9 NW 344, held: The breaking of land for the first time is not an improvement upon land and hence not lienable under Sec. 2130 of Code securing a lien to "every mechanic or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for, any building, erection, or other improvement upon land." The court said: "Now while breaking and turning over of the soil may constitute an improvement of the land, it cannot in any just sense be denominated an improvement upon the land . . . Fertilizers greatly improve land. It would probably not be claimed that a lien would be acquired for hauling manure upon land."

OGDEN v. BYINGTON et al, 244 P. 332 (Cal.)

2. Plaintiff, furnishing tenant stock and equipment for construction of irrigation ditches and levee work in preparing certain lands for planting rise, HELD not to have a lien on such land, under code Civ. Proc. Sec. 1183, establishing mechanic's lien, or section 1191, providing for lien on lots for improvement; work not having structural character or permanency necessary to bring it within statute.

HOWE v. MYERS. - 162 P. 1000, 94 Wash. 563, held labor for cultivating and caring for an orchard, which admittedly enhanced the value of the land, was not lienable under a statute providing that: "Any person who, at the request of the owner of any real property, his agent, contractor or sub-contractor, clears, grades, fills in or otherwise improves the same, or any street or road in front of or

adjoining the same, has a lien upon such real property for the labor performed, or the materials furnished for such purposes."

In this case the court said: "If the claim asserted is lienable under this statute, it must be so by virtue of the clause 'or otherwise improves the same.' It cannot be said that labor performed in cultivating and caring for an orchard is of the same general character or in the same general class as labor in grading, clearing, or filling in land, and therefore, under the well-known rule of ejusdem generis, is not within the statute. *EASTER ARK. HEDGE-FENCE CO. v. TANNER*, 67 Ark. 156, 53 S.W. 886 It is well settled that liens of this character are in derogation of the common law. They depend for their existence solely on the statutes, and the courts refuse to extend their operation for the benefit of those who do not come clearly within the terms of the statute." (Underlining ours).

III. RENTAL VALUE OF MACHINERY AND EQUIPMENT HIRED TO CONTRACTOR AND USED BY HIM IN CARRYING OUT CONTRACT FOR LEVELING LAND FOR AGRICULTURAL PURPOSES IS NEITHER "MATERIALS FURNISHED" OR "LABOR PERFORMED" UNDER THE CONTRACT AND IS NOT WITHIN THE SCOPE OF SECTIONS 14-2-1 AND 14-2-2 U. C. A: 1953.

The language of the statute limits the personal liability of the landowner, who has not required the contractor to furnish a bond, (assuming it was a case where the thing being built brought the contract within the statute), to those who have furnished materials or performed labor under the contract." The statute does not extend the personal liability of the landowner to one who has furnished a tool, a device, a machine, or piece of

equipment which was used in the construction, addition to, or alteration or repair of any building, structure or improvement upon land.

Modern tools, devices, machines and equipment are used in accomplishing labor but this does not mean that a bare tool, device, or machine constitutes labor or that the bare furnishing of a tool, device or machine constitutes "labor performed" or that the bare "rental value of machinery or equipment" hired to the contractor constitutes "labor performed." If a contractor or any other person does the work of construction with the use of a tool, or a device, or a machine, or equipment this constitutes "labor performed." We are certainly not contending that labor need be performed with one's hands or that modern tools, machinery and equipment cannot be used in performing the labor of construction. But, if a third person merely hires a tool, a device, a machine or equipment to a contractor or to someone else who is engaged in the construction, he does not himself, simply by furnishing a machine, "perform labor" in the construction. The bare furnishing of a machine is not performing labor. The tool, device or machine itself is not labor. When the contractor or workman engaged in the construction adds his skill and direction to the machine or tool, applies the "Know How" and operates the tool or machine, and sometimes uses other elements to make it work, such as gasoline or electricity, then "labor" is performed, but the tool, device or machine standing alone and un-applied (the thing hired in our case) does not constitute labor. It is the person who puts the machine to work who performs the labor, not the one who hires or otherwise furnishes the machine or tool to the contractor or workman.

It is respondents contention that the Utah Supreme Court has never heretofore passed on either of the questions involved in our case, namely, (1) whether a con-

tract for the leveling of land for agricultural purposes falls within the scope of the Utah Private Contractors' Bond Statutes; or (2) whether one who hires land-leveling machinery and equipment to a land-leveling contractor falls within the scope of these statutes, as one who has "furnished materials or performed labor under the contract."

The decision in the case of *J. F. TOLTON INV. CO. v. MARYLAND CASUALTY CO.* 293 P. 611, 77 Utah 226, is definitely not controlling or even in point in our case

as that case involved the construction of a surety bond while our case involves the construction of the Utah Private Contractors' Bond Statutes and quite a different rule of construction applies in the two cases. The same situation prevailed in all other cases cited in Appellant's Brief pages 13 to 19, both inclusive. Every one of these cases involved the construction of surety bond, and the rule of liberal construction against the surety for hire was applied in all of these cases. As heretofore pointed out a different rule applies when construing Mechanics' Lien Statutes and Private Contractors' Bond Statutes, particularly when determining what persons and objects fall within their scope. These statutes should not be liberally construed against a landowner in an effort to bring a landowner within the scope of the statute, who except for liberal construction, does not belong there, as heretofore pointed out.

In the majority opinion in the case of *J. F. TOLTON INV. CO. v. MARYLAND CASUALTY CO.*, supra, it was recognized that there is a conflict in the decisions as to whether an item for rental on equipment falls within the surety bond, (indeed there are many well reasoned cases holding to the contrary), and the court said: "without further reference to the cases, it may be said that, under the liberal rule of interpretation to which we are committed, we conclude that the charge in question is

within the obligation of the bond, and the surety was properly held liable.” (Underlined ours). The “liberal rule of interpretation” referred to in the opinion is the rule requiring a liberal construction or a surety bond, against a surety for hire. No such rule of liberal construction against the landowner can be properly applied when construing the statutes involved in our case to determine whether the contract in question falls within the statutes or the thing furnished by appellant falls within these statutes.

Justice Straup wrote a strong dissenting opinion in the TOLTON case in which he forcibly pointed out that the rentals agreed to be paid by the contractor for the use of an engine or other machinery used on the job was neither “materials” or “labor” within the meaning of the contract, and were not covered by the surety bond, despite the rule of liberal construction against the surety.

Must every landowner who has some structure built upon his land, where the amount involved exceeds \$500., inquire from the contractor and everyone who participates in the construction, whether every tool, appliance, device, or item of machinery or equipment used on the job has been rented, and if so must he decide at his peril whether the rental value of such tool, appliance, device, or machine has been paid? If the workman or contractor says he owns the tool, appliance, device, or machine that he is using must the landowner then ascertain at his peril whether the full purchase price has been paid — as no distinction should be made between one who leases equipment and one who sells it to a workman or contractor? Or is it sufficient if the landowner takes precautions to see that those who have “furnished materials” or “performed labor” within the ordinary and sensible meaning of these terms have been paid?

Had the Utah Legislature intended to impose liability on a landowner to pay the rental value of machinery, tools, appliances, or equipment hired to the contractor or anyone involved in the construction, and used on the job and then returned, it would have said so, like some state legislatures have done. As the statute stands it is not so worded, and cannot be extended by construction to read something into it which is not there.

When the statutes in question are not liberally construed against the landowner certainly it should be held that rental on machinery and equipment furnished to the land-leveling contractor does not fall within the scope of these statutes.

The following authorities are submitted as supporting the rule that the rental value of machinery and equipment hired to the contractor or to someone else on the job, which is used on the job but not consumed, is neither "materials furnished" or "labor performed," and does not fall within the scope of Mechanics' Lien Statutes or Private Contractors' Bond Statutes having the same or similar wording as the Utah Statutes:

36 AM. JUR. Page 56, Sec. 70. ". . . The general rule is that articles furnished for use merely as tools and appliances in carrying on the work of construction are not materials for which a mechanics' lien may be claimed. The same is true of machinery furnished for the contractor for use as a part of his plant or operations."

ROAD SUPPLY & METAL CO. v. BECHTELHEIMER et al, 240 P. 846, (Kan.) 2. The rent or value of the use of machinery, tools, and equipment used in public work is neither labor nor material within the meaning of our statutes pertaining to mechanics' liens.

NINNEMAN et al v. CITY OF LEWISTON, 129 P. 1073 (Idaho).

1. A lien cannot be had under the mechanic's lien laws of this state for tools and appliances which are the

property of the contractors or laborers, and that are not necessarily consumed in the specific work, but which may be used, from time to time, in other works and upon other contracts

WILKINSON v. PACIFIC MID-WEST OIL CO. et al 107 P. 2nd 726 (Kan.)

1. The rent or value of the use of machinery cannot be made the basis of a mechanics' lien.

CONSOLIDATED CUT STONE CO. et al, v. SEIDENBACH at al, 75 P. 2nd 442 (Okl.)

16. A subcontractor was not entitled to lien for rental for use of pans and ends which were furnished to contractor to hold concrete in place in building operations and which were removed by owner to be used on other jobs, since such pans and ends did not become part of the building.

MARION MACHINE, FOUNDRY & SUPPLY CO. v. ALLEN et al., 241 P. 450 (Kan.)

2. The tools and equipment used in the sinking of an oil and gas well, which forms no part of the well or completed work, is neither "labor not material" within the meaning of the lien statute.

GILBERT HUNT CO. v. PARRY, 110 P. 541, (Wash.)

1. Under the lien laws, generally, "material" is deemed to be something that goes into, and becomes a part of the finished structure, such as lumber, mails, glass, hardware, etc., which are necessary to the completion of a building.

2. The object of the lien statutes being to secure a lien for that which goes into the structure, articles furnished for use merely as tools and appliances are not lienable.

AMERICAN TANK & EQUIPMENT CO. v. T. E. WIGGINS, INC., et al., 42 P. 2d 114 (Okl.)

1. Mechanics' liens are in derogation of common law and exist solely by positive statute, which courts should

construe and enforce as remedial acts, but which cannot be extended to meet cases not within their scope.

3. Purchase price of pipe furnished to contractor for use in pumping sand and water in constructing embankment on railroad right of way held not lienable, since pipe constituted part of contractor's equipment.

HALL et al., v. COWEN et al., 98 P. 670, 51 Wash. 295.

1 A claim for rental on scrapers is neither "labor performed" nor "material furnished," within Ballinger's Ann. Codes & St. Sac. 5902, giving one who at the owner's request, grades, etc. land or a street in front thereof, a lien for the "labor performed" and "materials furnished."

The Court in HENRY BICKEL CO. v. NATIONAL SURETY CO. et al, 156 Ky. 695, 161 S. W. 1113, said: "The engine which was used in this case occupied the same place as a hammer, saw, or other tool used by the workmen. The person who rented the engine is no more entitled to a lien . . . than the merchant would be who sold the spades, drills, or other tools constituting his plant."

CONCLUSION

Owing to the fact that the contract pleaded, namely a contract for the leveling of land for agricultural purposes does not fall within the scope of the Utah Statutes relied upon by Appellant, and the rental value of machinery and equipment hired by Appellant to the land-leveling contractor constitute neither "materials furnished" or "labor performed" under the contract, hence Appellant's Complaint does not state a claim upon which relief can be granted and the decision of the District Court granting Respondents' Motion to Dismiss and dismissing the Complaint should be affirmed.

Respectfully submitted,
DURHAM MORRIS
Attorney for Respondents.