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## Creditor's Rights—Validity of Mortgage Where Accompanying Notes Invalid

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rest upon federal law and found instead that the problem whether property belongs to a taxpayer or not is a state law problem. Only after the interest of the delinquent taxpayer in the property has been established does the federal lien attach and the problem of priority of liens, as to which law is dominant, arise.<sup>20</sup>

By New York law, a surety which performs under its bond is an equitable lienor as of the date of the execution of the bond and is subrogated to the rights of the party protected by the bond, even though this equitable lien is not enforceable until the surety suffers a loss.<sup>21</sup> Just as the Authority could withhold and apply the funds, on default of the contractor, so could *Aetna*, subrogated to the Authority's rights as it was, with the result that the contractor never had any right or claim to the funds.

The distinction between the application of state law to determine property rights (who owns the property?) and the application of federal law to determine the relative priority of liens (when is a lien perfected within federal concepts?) is a question of some subtlety. In the *Aquilino* case, the statutory trust concept in New York which purports to create a type of proprietary interest in materialmen was not allowed to defeat the claims of the federal government because it had yet to be enforced. In *Aetna*, however, a proprietary interest superior to any claim of the United States is recognized even though the right to enforce that proprietary interest did not arise until after the tax liens came into effect. The distinction seems to be that in the former case the taxpayer had a vested interest in receiving the funds due, subject to his obligation to pay materialmen, whereas in *Aetna*, no right to receive the disputed funds had ever arisen in the taxpayer.

### Validity of Mortgage Where Accompanying Notes Invalid

When Amherst Factors, a domestic corporation not organized under the Banking Law, brought an action to foreclose a mortgage executed by deceased to secure a loan to a third party by Amherst, deceased's administratrix sought to have the mortgage declared void. She argued that a discounting of notes given by the recipient to Amherst, in violation of Section 131 of the Banking Law<sup>22</sup> made both the notes and the mortgage, securing payment of those notes, void,

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20. *Fidelity and Deposit Co. of Maryland v. New York City Housing Authority*, 241 F.2d 142 (2d Cir. 1957); *Morgan v. Commissioner*, 309 U.S. 78, 80 (1939).

21. *U. S. Fidelity and Guaranty Co. v. Triborough Bridge Authority*, 297 N.Y. 31, 74 N.E.2d 226 (1947); *Scarsdale National Bank and Trust Co. v. U. S. Fidelity and Guaranty Co.*, 264 N.Y. 159, 190 N.E. 330 (1934).

22. The section provides that only corporations organized under the Banking Law have power to discount notes, and that ". . . all notes and other securities for the payment of any money . . . made or given to secure the payment of any money loaned or discounted by any corporation or its officers, contrary to the provisions of this section shall be void."

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and that this transaction should be distinguished from the usual case of such mortgages since the mortgagor was not the recipient of the loan.

Affirming an order for summary judgment in favor of the plaintiff, Amherst Factors, a unanimous Court held,<sup>23</sup> as to the validity of the mortgage, that the point of law was settled in 1880, in the case of *Pratt v. Eaton*.<sup>24</sup> The Court said that although the notes were void because of illegal discount, so long as the corporation is authorized to lend money and the recital of the mortgage is that it is given to secure the loan, the mortgage is valid.<sup>25</sup> Answering the defendant's assertion of a distinction from the *Pratt* case, the Court held that, absent a transaction designed to evade the usury laws, the facts here are controlled by that case. Since the giving of a mortgage to secure the debt of a third party is legal and proper, there is no more reason to compromise the position of the lender than where the mortgagor is the recipient of the loan.

In the instant case, the Court reaffirms an established doctrine, making it explicit that it shall be applied even where the mortgage is executed for the benefit of one other than the mortgagor.

### Estoppel of Debtor from Asserting Defense

Section 18 of the Lien Law provides that a lien filed with the State Comptroller and Department of Public Works remains valid and effective only for six months unless an action is commenced to foreclose the lien within that time or an order is obtained from the Court extending it.

In *Triple Cities Construction Co. v. Maryland Casualty Co.*,<sup>26</sup> plaintiff-subcontractor brought an action against defendant bonding company on a bond given by the defendant pursuant to chapter 707 of the Laws of 1938 (now State Finance Law, section 137), which guarantees prompt payment of all moneys due to laborers and materialmen from general contractors engaged in the construction of public improvements for New York State. However, section 137 also provides that it is a condition precedent to securing any rights and benefits under this statute that materialmen must file and enforce a mechanics lien, pursuant to the New York Lien Law. Defendant contended that plaintiff, by failing to comply with the requirements of section 18 of the Lien Law, had allowed its lien against the general contractor to expire and therefore was precluded from bringing an action on the bond. The Court of Appeals held that there was sufficient evidence for the jury to find that the defendant, by deliberately engag-

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23. *Amherst Factors, Inc. v. Kochenburger*, 4 N.Y.2d 203, 173 N.Y.S.2d 570 (1958).

24. 79 N.Y. 449 (1880).

25. *Pratt v. Eaton*, *supra* note 24.

26. 4 N.Y.2d 443, 176 N.Y.S.2d 292 (1958).