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Creditor's Rights—Estoppel of Debtor from Asserting Defense

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COURT OF APPEALS, 1957 TERM

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,²³ as to the validity of the mortgage, that the point of law was settled in 1880, in the case of *Pratt v. Eaton*.²⁴ 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.²⁵ 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.*,²⁶ 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-

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).

ing in protracted negotiations which misled and lulled the plaintiff into inactivity, was estopped from asserting plaintiff's nonenforcement of its lien as a defense.²⁷

Sufficiency of Bankruptcy Proceedings — Per Curiam

Execution pursuant to a 1931 judgment was properly vacated both because the permission of court required by section 651 of the Civil Practice Act²⁸ was not obtained and because the judgment debtor had been discharged in bankruptcy. Since the judgment was properly listed in the bankruptcy proceedings, although the addresses of the judgment creditors were listed as unknown, the burden was upon the judgment creditors to "show that the bankrupt knew or in the exercise of reasonable diligence should have known their addresses . . . at the time of the bankruptcy proceedings."²⁹

CRIMINAL LAW

Reindictment After Reversal of Conviction Not Double Jeopardy

In *People v. Ercole*,¹ an appeal from a conviction for larceny had been reversed and the indictment dismissed because it had been improperly amended.² The defendant was reindicted and thereafter moved for a dismissal on the ground that he was being placed in jeopardy twice for the same offense. The motion was granted, and affirmed by the Appellate Division.³ The Court of Appeals unanimously reversed, holding that a defendant who procures a reversal of a conviction for legal error at his trial cannot plead the former conviction in bar to a second trial for the same offense.

The defendant relied on a number of cases, all of which were based on the unlawful termination of the trial without the consent of the accused.⁴ New York has long held, in double jeopardy cases, that the essence of a successful appeal on

27. An estoppel "rests upon the word or deed of one party upon which another rightfully relies, and so relying changes his position to his injury". *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 292, 130 N.E. 295, 298 (1921).

28. *Levine v. Bornstein*, 4 N.Y.2d 241, 173 N.Y.S.2d 599 (1958).

29. *Shire v. Bornstein*, 4 N.Y.2d 299, 174 N.Y.S.2d 645 (1958).

1. *People v. Ercole*, 4 N.Y.2d 617, 176 N.Y.S.2d 649 (1958).

2. 308 N.Y. 425, 126 N.E.2d 543 (1955).

3. *People v. Ercole*, 4 A.D.2d 881, 167 N.Y.S.2d 548 (2d Dep't 1957).

4. *People ex rel. Stabile v. Warden*, 202 N.Y. 138, 95 N.E. 729 (1911) (Judge arbitrarily dismissed a jury that had not reached a verdict); *People ex rel. Blue v. Kearney*, 292 N.Y. 679, 56 N.E.2d 102 (1944) (During trial for manslaughter the judge discharged the jury. He felt that under N.Y. Code Cr. Proc. §400 defendant should be reindicted for murder in the second or first degree).