

10-1-1957

Creditor's Rights—Damages on Lapse of Mechanics' Liens

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Recommended Citation

Thomas Beecher, *Creditor's Rights—Damages on Lapse of Mechanics' Liens*, 7 Buff. L. Rev. 107 (1957).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol7/iss1/43>

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authority, over a lien filed after approval, explicitly stating that the comptroller held an attachable debt at the date of the surrender of the license.¹⁵

In the instant case, the dissent questioned the applicability of the rule in regard to after-acquired chattels, stated above, since the fund necessarily arises out of a present property right, and the policy of that rule, the possibility of fraud on creditors is not applicable here. The general rule where the fund is to arise out of an existing relationship between the assignor and the potential source of the fund, is that such an assignment is valid against creditors of the assignor who acquire liens after the fund comes into existence.¹⁶

Nevertheless, a liquor license refund in New York is now deemed to come into existence at two different times; by authority of *Strand v. Piser*,¹⁷ at the surrender of a judgment creditor, and, according to the instant case, on the approval of the refund in the case of an assignee acquiring his right before surrender of the license.

Damages On Lapse Of Mechanics' Liens

The grantee of a certain piece of real property orally promised to pay the contractor for improvements made while the grantor was in possession. When the contractor brought a suit to foreclose a mechanic's lien against the grantor and the grantee for these improvements he allowed the lien to lapse by failing to file a notice of pendency within one year from the date of the filing of the lien.¹⁸

In its consideration of this factual situation, the Court of Appeals¹⁹ in a unanimous opinion, held that even though the lien had lapsed²⁰ and even though the complaint alleged a contract to make specific improvements²¹ the plaintiff could recover a personal judgment against the grantor-lienee,²² but he could recover nothing against the grantee.²³ Upon deciding these issues, the Court faced the central problem raised by this case: What constitutes an appropriate award under these circumstances? The Court decided that the personal judgment that

15. *Strand v. Piser*, 291 N.Y. 236, 52 N.E. 2d 111 (1943).

16. *Niles v. Mathusa*, 162 N.Y. 546, 57 N.E. 184 (1900); *Bates v. Salt Springs Nat'l Bank*, 157 N.Y. 322, 51 N.E. 1033 (1898); *Fairbanks v. Sargent*, 117 N.Y. 320, 22 N.E. 1039 (1889).

17. See note 15 *supra*.

18. N.Y. LIEN LAW §17; *Danziger v. Simonson*, 116 N.Y. 329, 22 N.E. 570 (1889).

19. *Noce v. Kaufman*, 2 N.Y.2d 347, 161 N.Y.S. 2d 1 (1957).

20. See note 18 *supra*.

21. As long as the defendants are not misled, the New York rule is that the variance between pleading and proof will not be considered. *Sussdorff v. Schmidt*, 55 N.Y. 319 (1873).

22. N.Y. LIEN LAW §§17, 54.

23. Under the Statute of Frauds an oral promise to assume the debt of another is unenforceable. N.Y. PERSONAL PROPERTY LAW §31(2).

the plaintiff received must be limited to the same material and labor that a foreclosure of the mechanic's lien would have been limited to.

In substantiation of this principle the Court relied on two New York cases.²⁴ An examination of these cases indicates that the instant case is an extension of the law in this field, since neither of these cases squarely face the issue of whether or not payment for items of personalty can be included in the personal judgment given under the law when a mechanic's lien fails. Nor does the language of the governing statutes²⁵ clearly resolve this problem. The statute limiting the duration of a mechanic's lien²⁶ indicates that a personal judgment can be granted for the amount specified in the lien when it has lapsed. That, of course, would exclude personalty as an element of the judgment. The other statute²⁷ relied upon provides for a judgment where no lien is established. This indicates that the plaintiff can recover such sums as he might recover in an action on a contract. This would seem to include personalty.

This apparent contradiction has now been judicially obviated by the clear statement from the Court of Appeals that only matters which are the subject of a mechanic's lien can be assessed in arriving at the amount of the personal judgment given in an action to foreclose a mechanic's lien which has lapsed due to failure to file a notice of pendency.

CRIMINAL LAW

Uniform Traffic Ticket Used As An Information For A Pleading

In reversing the conviction in *People v. Scott*,¹ the Court held (4-3) that a uniform traffic ticket was not a sufficient information to be used as a pleading and also that such a defect was not waived by the defendant's plea of guilty. The defendant was convicted of operating a motor vehicle while intoxicated, in violation of the Vehicle and Traffic Law.²

Where the defendant is charged with a misdemeanor, an information is absolutely required.³ The Code of Criminal Procedure defines an information as an "allegation made to a magistrate that a person has been guilty of some designated crime."⁴

24. *McGraw v. Godfrey*, 56 N.Y. 610 (1874); *Darrow v. Morgan*, 65 N.Y. 333 (1875).

25. See note 21 *supra*.

26. N.Y. LIEN LAW §17.

27. N.Y. LIEN LAW §54.

1. 3 N.Y.2d 148, 164 N.Y.S.2d 707 (1957).

2. N.Y. VEHICLE AND TRAFFIC LAW §70(5).

3. *People v. Grogan*, 260 N.Y. 138, 183 N.E. 273 (1932).

4. N.Y. CODE CRIM. PROC. §145.