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NO. 65732-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

COASTAL COMMUNITY BANK,

Third-Party Defendants/Appellant

v.

MADI GROUP, INC.,

Third-Party Plaintiff/Respondents

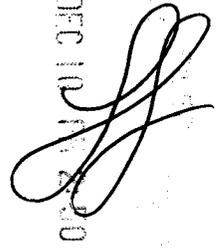
REPLY BRIEF OF APPELLANT

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INTRODUCTION

This case is first a question of waiver, because if there is waiver by conduct as a matter of law, assuming without deciding whether Madi properly plead and proved its claim of lien, all other issues are moot. Whether the taking of a deed of trust on the same property, and a promissory note with a term beyond the statute of limitations for enforcing a mechanic's lien is waiver by conduct is an issue of first impression in Washington. Coastal submits no statute controls this situation, and therefore the common law provides that this conduct is waiver as a matter of law. Madi Group counters that RCW 60.04.191 should apply and is not satisfied, and waiver should not be presumed. But Coastal should prevail on the waiver issue, because RCW 60.04.191 does not apply to deeds of trust by the plain language of the statute, and a promissory note with a term longer than the statute of limitations for enforcing on a mechanic's lien is "express" language in the note satisfying the requirements of RCW 60.04.191 and interpreting case law, regardless. While conceding that the common law indicates the deed of trust and promissory note may be evidence of intent to waive, without more, Madi Group presents no evidence contradicting the waiver worked by the deed of trust and promissory note. Therefore, summary judgment should be entered for Coastal confirming the superior priority of Coastal's deed of trust.

The second issue in this case is whether Madi's claim of lien is subordinate to Coastal's deed of trust under RCW 60.04.031(5) because Madi did not file a "notice of professional services" in the real property records until well after recording of Coastal's deed of trust. Madi argues that because Coastal admits it knew of some work by Madi (that Madi admits it was not even aware that Coastal knew about until this litigation) was being done for Pacific Ventures (who did not own the real property in question at the time) in this litigation, that its \$186,795.00 bill for "architectural services" has a priority over Coastal's deed of trust on the real property. Coastal counters that if the professional services are not visible or otherwise situated on the property, then there is no relate back priority over a deed of trust on the property, and the services attach only to the improvement, if any. Madi's interpretation of the statute is contrary to the plain text, and contrary to the strong policy that a professional service provider should record its Notice of Professional services in the real property records to preserve a lien on the real property. Madi states it had no idea or inkling whether its lien had priority over Coastal's deed of trust, because there was no communication directly between Coastal and Madi. (Resp. Br. at 27). Now Madi is relying on a fortuity of Coastal's due diligence to claim a lien prior to Coastal's purchase money deed of trust. This is a windfall. This is a windfall because it is contrary to the

expectations of all the parties involved. Coastal did its due diligence, physically inspected the property, noted nothing of concern in the real property records in its title examination, and proceeded, satisfied in its priority and first place position on title. A simple Notice of Professional Services in the real property records would have protected Madi, Coastal would have seen this when doing a title search in preparing to lend the purchase money, and would have been able to know Madi was intending to be and was expecting to be first in first position.

Lastly, Coastal argues it was error for the trial court to give priority to Madi and strike the trial date because there are genuine issues of material fact. There are genuine issues of material fact as to the priority date of the services because the evidence shows there are two contracts, one of which is not in evidence. Likewise, Coastal argues that the plans were always owned by Madi Group (which they also admit), and those services never attached to the real property. In short, there are genuine issues of material fact as to the nature, scope, and type of lienable professional services. That Pacific Ventures owes Madi Group \$186,795.00 plus interest pursuant to some (unknown) contract is irrelevant to how much of that contract was for lienable professional services- something Madi must prove. And the fees, if the contract is not available, are for “reasonable fees”—a question of fact not appropriate for

summary judgment. That is why a trial is needed and it was err to grant Madi's motion for summary judgment.

I. RESPONSE TO MADI'S STATEMENT OF THE CASE

Madi Group states that Coastal lent money for the purchase and the development of the real property in question. (Br. Of Resp. at 1). Coastal only lent money for the purchase of the property. Madi Group states that Pacific Ventures Redmond Ridge hired Madi Group to provide design and engineering services. (Br. Of Resp. at 1). However, Madi Group neglects to mention it is undisputed that Madi Group never provided plans that were signed and ready for construction. Madi Group neglects to mention that it asserted ownership over all of its work product. (CP 095). Madi Group does admit that it never knew that Coastal had seen some preliminary scoping plans. (Resp. Br. at 27).

II. REPLY ARGUMENT

A. CROSS MOTIONS AND BURDENS

Madi moved for an order that their lien attached to the real property and was prior to Coastal's deed of trust. The lien claimant bears the burden to prove their claim of lien is on real property, is valid, and is superior to a deed of trust. *McAndrews Group, LTD v. Ehmke*, 121 Wn. App. 759, 90 P.3d 1123 (2004) (lien claimant bears burden under under the test in RCW 60.04.031(5), remanding even where the lien claimant's

testimony was unrebutted on the issue of visible professional services); *see also, Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 111 P.3d 866, 871 (Div. 1 2005)(party moving for summary judgment bears the burden of demonstrating there is no genuine dispute as to any “material fact,” which is a fact upon which the outcome of the litigation depends, in whole or in part).

Madi’s response brief on appeal argues “Coastal failed to file any affidavits or other credible evidence contradicting Mr. Jayachandran’s Declaration. Thus Madi was entitled to judgment as a matter of law.” (Br. of Resp. at 11). Coastal opposed Madi’s summary judgment motion by arguing Madi was not entitled to judgment as a matter of law because of waiver and subordination which are, in turn, undisputed. But Coastal also went further. Coastal showed specific evidence that contradicted the Declaration of Mr. Jayachandran, all reasonable inferences in favor of the non-moving party. (CP 267-271).

Therefore, Madi is wrong for two reasons. First, a plaintiff moving for summary judgment must show evidence of every element of its prima facie case, and that the Mr. Jayachandran’s Declaration is simply not sufficient to carry Madi’s burden of production on a motion on summary judgment against a deed of trust because it does not provide evidence that Madi’s professional services were visible on the site even prior to

Coastal's deed of trust or that Madi had recorded a timely notice of professional services in the real property records. Therefore Madi's lien is subordinate or attached only to the improvements and not the real property and summary judgment for Madi was improper.

Second, even assuming Madi met its burden of production on the motion, Coastal submitted evidence that showed there were two contracts for services, pointing out that Madi failed to introduce the second contract into evidence to demonstrate that its start date was prior to Coastal's deed of trust. (CP 267-271). Coastal pointed out that Madi's start date is in question because there were two separate contracts successive in time, and Madi has not proved (or shown specific undisputable evidence) that its second Contract had lienable services that began prior to Coastal's deed of trust. (CP 267-271). For lien purposes, whether "work contemplated by the [first] contract or work performed pursuant to a [second] contract [is lienable] is a question of fact." *Reid Sand & Gravel, Inc. v. Bellevue Properties*, 7 Wash. App 701, 704-705, 502 P.2d 480 (1972). Moreover, a lien is upon improvements only for the contract price, and where there is no contract, the lien is only for lienable fees that improve the property that are "reasonable" - a question of fact. RCW 60.04.011(2).

These genuine issues of material fact are fatal to Madi's motion for summary judgment that its lien is prior to Coastal, and the Court erred in granting it.

Madi Group argues that Coastal has asserted newly minted arguments on appeal. However, Madi Group bears the burden to prove the scope of its lien, what that lien is upon, and prove that such lien is prior to Coastal's deed of trust as part of its prima facie showing. *McAndrews*, 121 Wn. App. 759; *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 502, 210 P.3d 308 (2009). The attachment, perfection, and priority requirements of Washington's mechanic's statute are mandatory and cannot be waived by the court. *DKS Construction Management, Inc. v. Real Estate Improvement Company, LLC*, 124 Wn. App. 532, 534, 201 P.3d 170 (2004); RCW 60.04.031(6); RCW 60.04.091. The lien claimant bears the burden to prove their claim of lien on property is valid and superior to a deed of trust. *McAndrews*, 121 Wn. App. 759, 90 P.3d 1123(2004).

When the improvement is situated on the land, the lien then attaches to the owner's interest in the land. RCW 60.04.021(improvement); RCW 60.04.051(land); RCW 60.04.061(land); *Haselwood*, 166 Wn.2d at 502 (interpreting RCW 60.04.061), *see also, Alexander, C.J., dissent*. A lien claimant, of course, must attach and

perfect its lien by strictly complying with the recorded notice requirements of the statute. RCW 60.04.031; RCW 60.04.091.

Madi states that Coastal argues for the first time on appeal that there is some question about the nature of Madi's services and whether they were for improvements to the property and whether Madi's lien attached to the "improvements or the real property itself." (Resp. Br. at 9). This is false, as it was even argued at oral argument. (RP 006) ("The plans that they received were unsigned, had not been stamped, and were indicated or designated as not being for construction. So what Pacific Ventures ultimately received from Madi did not confer any benefit directly on the property.") Mr. Jayachandran's declaration even admits "[t]he plans were and always have been the property of Madi Group." (CP 095). There is no lien attached to the real property. *Haselwood v. Bremerton Ice Arena*, 166 Wn.2d 489. The law is clear that Madi Group has the burden of proof to prove the nature and scope of their lien, in addition to the amount of their lien, not Coastal. *McAndrews, supra*; *Haselwood, supra*. The law only permits a lien upon an improvement, until a building is built or the services are visible on the land (or a notice of professional services is filed in the real property records), and that is all Madi is entitled to. RCW 60.04.021; *Lipscomb v. Exchange Nat. Bank of Spokane*, 80 Wash. 296, 141 P. 686 (1914); *Haselwood v. Bremerton Ice Arena, Inc.*, 166

Wn.2d 489, 507-508, 210 P.3d 308 (2009)(discussing legislative intent of RCW 60.04). Therefore, it is err for the trial court to rule that Madi's mechanic's lien on improvements is superior to Coastal's deed of trust.

Coastal moved for summary judgment that there were no issues of material fact that Madi waived its lien as a matter of law, or that its lien was only upon the improvements and otherwise subordinated to Coastal's deed of trust under RCW 60.04.031(5).

B. WAIVER

There is waiver by conduct as a matter of law because taking the Deed of Trust and Promissory Note is an unequivocal act, and such act is evidence of intent to waive. There is no evidence rebutting this result creating a genuine issue of material fact. Therefore, summary judgment should enter for Coastal that its deed of trust is superior to Madi Group's claims.

1. Coastal has shown taking the deed of trust and the promissory note are unequivocal acts, and such acts and conduct is waiver of the mechanic's lien as a matter of law.

Madi points out that implied waiver by conduct requires unequivocal acts evidencing intent to waive. (Br. of Resp. at 13). "[W]aiver by conduct 'requires unequivocal acts of conduct evidencing an intent to waive'" *Am. Safety. Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d

762, 771 (2007). Madi also later asserts that a promissory note and deed of trust are mere evidence of intent to waive. (Br. of Resp. at 24); (CP 226). Madi is correct on both counts. But Madi is wrong in applying this law, because Coastal has met this burden on its motion for waiver by showing the unequivocal granting and accepting (acts) of (1) promissory note with a term longer than that in which Madi could enforce its mechanic's lien (waiver) and (2) a deed of trust on the same property as the statutory mechanic's lien claim (waiver).

Madi Group states that the taking of the deed of trust and promissory note are equivocal acts at best. (Br. of Resp. at 14). Madi Group does not explain this unwarranted conclusion- Madi simply makes the conclusion. The promissory note and deed of trust are undisputed. The deed of trust and promissory notes are unequivocal acts constituting waiver as a matter of law of any mechanic's lien rights for the following reasons: (a) taking and accepting both the promissory note and the deed of trust is an unequivocal act, *Am. Safety. Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d at 771; (b) the common law holds that such documents, without more, are evidence of waiver. *Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co.*, 111 Wis. 570, 573-574 (1901); *Gorman v. Sagner*, 22 Mo. 137(1855); *Spaulding Logging v. Ryckman*, 139 Or. 230, 242, 6 P.2d 25 (1932). “[Evidence of a deed of trust and promissory note] may

serve to warrant the inference of an intent to waive in the absence of other satisfactory evidence on the subject.” *Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co.*, 111 Wis. 570, 573-574 (1901). Accordingly, because Madi has not rebutted the promissory note and deed of trust with contemporaneous documentary evidence of a contrary intent, there is implied waiver by conduct as a matter of law. *Gorman v. Sagner*, 22 Mo. 137(1855); *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wash. App 238, 46 P.3d 821, 819 (2002) (because a written contract predominates over contradictory manifestation, a contradictory manifestation cannot alone be sufficient to raise a genuine issue of material fact). Summary judgment should have been granted to avoid a useless trial.

a. The granting and accepting of the deed of trust and promissory note are unequivocal acts.

Madi states that “the most that can be said is that taking the Promissory Note and Deed of Trust were equivocal acts.” (Br. of Resp. at 14). Madi provides no basis for this statement, and *Am. Safety. Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d at 771, which Madi relies on, does not support Madi’s unreasoned conclusion. In *Am. Safety v. City of Olympia*, the court pointed out that the facts showed that the City performed equivocal acts because the City “asserted three times it was not waiving” and that the City merely “agreed to *consider* negotiations” while never

concluding negotiations. *Am. Safety. Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d at 771. Here, on the other hand, the acts are unequivocal because Madi and Pacific Ventures concluded negotiations and gave and accepted a promissory note and a deed of trust. The terms of the note and deed of trust to not preserve the lien.

b. A deed of trust and a promissory note with a term that extends payment beyond the time in which a lien valid , without more, is waiver as a matter of law.

Madi relies erroneously on *Boise Cascade* that the promissory note and deed of trust cannot be waiver because of RCW 60.04.191 (Br. of Resp. at 14). The plain text of RCW 60.04.191 does not include a “deed of trust” and the express terms of the promissory note constitute waiver. In *Boise Cascade* there was an applicable statute that prevented the promissory note from working *discharge* by payment, unless the promissory note stated it was discharged. There is no such statute that governs the effect of a deed of trust, and the common law controls here. There was no deed of trust at issue in *Boise*, nor was there a promissory note with a maturity date beyond the time allowed for the bringing of a mechanic’s lien foreclosure collection action at issue in *Boise*.

Moreover, in *Boise*, the promissory note had express language saying it was *not* waiver. *Boise*, 67 Wn.2d at 293 (“neither the giving nor

the acceptance of this note with or without security shall be held to waive the payee's right to enforce any lien for materials or other lien to which it is otherwise entitled.") Here, neither the promissory note nor deed of trust contain such language. On the contrary, the promissory note contains language evidencing the intent that the maker did not have to pay the note until after the time in which the holder could bring an action on a mechanic's lien and that the maker would "forebear other means of collection." (CP 153-154). Other means of collection would include *initiating* a foreclosure action on the lien. This is also waiver at the common law.

Madi states that the note provided no commitment to forebear all other means of collection, except to "forebear obtaining judgment" (Br. of Resp. at 17). This is patently false and the opposite of what the Note says. The Note says that "Holder agrees to forebear other means of collection, including delaying judgment on any ongoing litigation, provided all payments are made as provided herein." (CP 153-154).

It is undisputed that there was no "ongoing litigation" between the Maker and the Holder at the time the Note was made, therefore the promise to forebear other means of collection would include *initiating* a foreclosure action on a lien.

The Note only required a single payment, and the Maker was not even in default when this action of collection on the mechanic's lien was started. In short, there would be no lien on anything on the Due Date of the note. But even assuming there was a lien, there would be no lien on the Due Date of the Note based upon Madi's recording of its claim of lien on March 6, 2009 (CP 137-138) and a lien expiration date of (at latest) November 6, 2009 under RCW 60.04.141 (lien only binds property for 8 months after "claim of lien" has been recorded) and a Note maturity date of December 17, 2009 (CP 153-154) (41 days after there was no lien). Madi breached its agreement to forebear under the Note, and the express terms of the Note constitute waiver of the lien. Accordingly, Madi's statement "the statements in the Promissory Note specifically contemplate the existence of litigation and a lien at the time final payment is made" (Br. of Resp. at 17) is false under the undisputed facts of this case.

To defend its actions by providing a note with a maturity date beyond the statute of limitations for collecting on the mechanic's lien, Madi claims that they extended the 8-month statute of limitations by giving credit. (Resp. Br. at 20). This new argument is also without merit. According to RCW 60.04.041 the terms of the credit must be in the "claim of lien." Madi's claim of lien is provided at CP 137-138. There are no terms of credit in that claim of lien. Madi breached its agreement to

forebear under the Note and the express terms of the Note constitute waiver of the lien.

But most importantly, here, there is a deed of trust that constitutes waiver of the mechanic's lien as a matter of law. There is no statute in Washington that abrogates the common law and prevents a deed of trust from being waiver of a mechanic's lien as a matter of law.

Madi Group states that Coastal "reads out" of the RCW 60.04.191 the language "or other evidence of indebtedness," which, Madi argues, would clearly include a deed of trust. (Br. of Resp. at 18). Madi is plainly wrong. This interpretation strains reason, runs counter to the canon of construction that when the legislature uses a term from the common law that term applies, and runs counter to the statutory language that treats deeds of trust as an encumbrance not as a payment device. RCW 60.04.226; RCW 60.04.161. The plain language of RCW 60.04.191 does not apply to waiver by taking security. RCW 60.04 *et seq* acknowledges deeds of trust are "encumbrances" on title, not "evidence of indebtedness." RCW 60.04.226 (a deed of trust is an encumbrance). A deed of trust is not a "promissory note or other evidence of indebtedness" under RCW 60.04 *et seq*, but is an "encumbrance." *See* RCW 60.04.161 ("...any lien, mortgage, deed of trust, or other encumbrance..."). Put another way, "evidence of indebtedness" is not security or an encumbrance. Why even

have security or encumbrances if a promissory note or other evidence of indebtedness is security or an encumbrance? They are not, and RCW 60.04 et seq treats them differently and in a mutually exclusive manner. RCW 60.04.191 (discussing *discharge by payment*).

Madi Group finally complains that implied waiver by taking a deed of trust and promissory note “runs counter to modern concepts of additional and alternate security.” (Br. of Resp. at 18.) Madi cites no cases or statutes elucidating “modern concepts of additional and alternate security.” Instead, Madi misquotes the RCW 60.04.191 statute. (CP 221).

There is nothing unequivocal about the action or the documents. Madi’s statement that the actions of giving and accepting the promissory note and deed of trust are “equivocal” is without merit. Therefore, Coastal has met its burden on its motion for summary judgment.

2. Summary Judgment is proper for Coastal Community Bank.

Madi even concedes that the common law holds that deeds of trust and a promissory note are evidence of the intent to waive a statutory mechanic’s lien, without more, but seems to then argue that such is a question of fact for the trier of fact. (Br. of Resp. at 24); *See Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co.*, 111 Wis. 570, 573-574 (1901)(“[evidence of a deed of trust and promissory note] may serve to

warrant the inference of an intent to waive in the absence of other satisfactory evidence on the subject.”) But summary judgment is appropriate here because Madi did not introduce any evidence of any intent not to waive, contemporaneous with or after the deed of trust and note. That is, Madi failed to rebut the deed of trust (which constitutes waiver) and promissory note with a term longer than the time in which to initiate a foreclosure on the mechanic’s lien (which constitutes waiver).

Mere testimony offered for the first time in litigation by Mr. Jayachandran cannot overcome the clear act of the contract of the deed of trust and promissory note and that is also inconsistent with the contemporaneous reasons given for the deed of trust and promissory note. *See e.g., Strong v. Terrel*, 147 Wn. App. 376, 195 P.3d 977 (2008), *review denied*, 165 Wn.2d 1051, 208 P.3d 555 (2009)(statements of ultimate fact and conclusory statements of fact unsupported by evidence or law are insufficient to overcome a summary judgment motion); *see also, BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wash. App 238, 46 P.3d 821, 819 (2002) (because a written contract predominates over contradictory manifestation, a contradictory manifestation cannot alone be sufficient to raise a genuine issue of material fact). It is undisputed that the owner expressed shock and dismay at the continued assertion of the mechanic’s lien after he signed the note and granted the deed of trust. (CP 172). It is

undisputed that the promissory note and deed of trust were given to allow Pacific Ventures (the Maker) “more time to arrange new financing in order to pay off Madi Group without necessity of filing suit on the lien.” (CP 176, Letter from William A. Linton to William Hegger). Madi now asserts that the deed of trust and promissory note’s purpose was to “cover bets” (Br. of Resp. at 23-24)—this is a newly minted argument designed for litigation unsupported by evidence. The facts supported by evidence speak for themselves- there was waiver the moment the deed of trust and promissory note were given to Madi Group.¹

Madi Group chides Coastal for not citing “contrary authority” in Wisconsin that requires a party asserting waiver to “perform.” *Carl Miller Lumber Co. v. Meyer*, 183 Wis. 360, 196 N.W. 840 (1923). That same authority indicates a promissory note with a term beyond the time in which to collect by foreclosing a mechanic’s lien is waiver. *Carl Miller Lumber Co. v. Meyer*, 183 Wis. 360 (“the note suspends the time of payment and the payee is estopped from asserting the lien in violation of his contract to extend the time of payment until the note matures.”) Madi itself did not uphold its end of the bargain. But more importantly, Coastal had nothing to perform to Madi. Nonetheless, Coastal, a third party, may assert waiver of the claim of lien as a defense, because a mechanic’s lien

¹ Of course, if this court determines there is a genuine issue of material fact as to whether the parties intended to not waive, there must be a trial.

is a right *in rem* and not *in personam*. *Adel v. Blattman*, 57 Wn.2d 337, 341, 357 P.2d 159 (1960). Therefore “a waiver may be used as a defense not only by the party in whose favor it was executed, but also by any other person who has or acquires rights in the property interest which would have been subject to the lien.” *Brian A. Blum*, *Mechanics’ and Construction Liens in Alaska, Oregon, and Washington* §4.3 p.132 (Issue 4 1994)(citing same). The requirement to perform before asserting the waiver defense is inapplicable because there was no requirement for Coastal to perform anything benefiting Madi Group.

III. SUBORDINATION

The notice mentioned in RCW 60.04.031(5) that may save a professional services mechanic’s lien where there is no statutory notice of professional services in the real property records, is only that notice of professional services derived from a visual inspection of the property. This is evident from the grouping of the professional services that are visible with the RCW 60.04.011(5)(a) and (b) improvements in RCW 60.04.031(5)- in both the first and second clauses. Here, Madi admits there were no signs of professional services on the real property prior to Coastal’s deed of trust (or even afterward), therefore, its failure to record a Notice of Professional services prior to Coastal’s deed of trust renders its claim for a lien upon the real property subordinate to Coastal’s deed of

trust under RCW 60.04.031(5). There is simply no room in the text of RCW 60.04.031(5) to carve out an exception for claims *on the real property* against mortgagees whose borrowers have shown them preliminary scoping work performed by professional service providers for borrowers. If a professional service provider wants the mortgagees and purchasers to know they are providing professional services for the improvement of the real property, they can simply record a Notice of Professional Services. Otherwise, their lien, if any, is only upon the “improvements” they create, unless of course those services were situated and visible on the land. *McAndrews*, 121 Wn. App. at 764. A professional service provider can record such notice whenever they want, and they do not need to wait until there is a default in payment. RCW 60.04.031(4)-(6). This is a bright line feature somewhat unique to Washington’s mechanic’s lien statutes, designed for that very reason. If they do not record such notice, they may not have a lien upon the real property unless their professional services were visible from an inspection of the real property.

Madi Group misquotes RCW 60.04.031(5). (Br. of Resp. at 33). Not only do they read into the text language that is not there, but they *write into* the text “actual notice.” (Br. of Resp. at 33). “If the mortgagee or purchaser acts in good faith and **without actual notice** of the

professional services being provided. RCW 60.04.031(5).” (Br. of Resp. at 33)(emphasis in original). This is a flagrant misquotation of the plain language of the statute, and underscores precisely what the statute would need to say if it should be interpreted as Madi Group wants. Madi Group is wrong, that statute does not say that and can’t be interpreted that way. The statute must be interpreted from its plain language, with the backdrop of the common law cases regarding recording of notices by engineers and other professional services and legislative history if the plain language is not clear. The case law, legislative history, and commentators are in agreement that a professional service provider who does not record a Notice of Professional services does so at their peril. Here, Madi Group admits that it did not expect to have priority for its work over Coastal as it was doing its work. (Br. of Resp. at 27)(“At the time, it was unknown whether the lien could or would relate back to the start of work because there was no communication directly between Coastal and Madi. Thus it was unknown whether Coastal had actual notice of the services by Madi.”)

Madi argues that the change in the statutory language from “may record” to “shall record” shows legislative intent to “give priority to a lien for professional services regardless of whether a notice had been filed if the competing lender had prior actual notice, i.e. knew of, the professional services.”(Br. of Resp. at 35). This conclusion is unwarranted, and

requires writing into the statute “actual notice” just as Madi misquoted. On the contrary, the “shall record” went to “may record” so that professional service providers whose services were visible on the site would still have an inchoate mechanic’s lien on the real property. The “shall record” language makes recording mandatory to even claim a lien on real property or improvements. RCW 60.04.031(6). The “may record” language preserves inchoate claims on real property for visible professional services, and inchoate claims of liens on improvements for non-visible professional services. The change from “shall” to “may,” however, does not change the statutory framework that if a professional service provider does not record in the real property records its claim of lien can only be upon the improvement, unless the services are visible on the site. *McAndrews*, (citing RCW 60.04.021 and RCW 60.04.061); *Haselwood*, 166 Wn.2d 489, 507-508.

Madi Group tries to apply a five part test under whether it has priority under RCW 60.04.031(5). Footnote 5 in *McAndrews*, mentioning the 5 part test, is not the holding of *McAndrews*, but merely another lien claimant’s proffered version of a test gleaned out of the plain language of RCW 60.04.031(5). Another fatal flaw with the 5 part test is that the test shifts the burden of proof off the lien claimant—a possibility the *McAndrews* court expressly rejected. It is extremely important to note that

the five part test was rejected by *McAndrews* even though offered by the party whom the court ruled in favor of, and is dicta. *McAndrews*, 121 Wn. App. at 764 fn5. *McAndrews* did not contemplate that a lien for professional services may not be upon the real property, a scenario not at issue in *McAndrews*, but plainly contemplated by the statutes. *Haselwood*, 166 Wn.2d 489. The 3 part test in *McAndrews* controls, footnote 5 is dicta, and Madi Group does not have a lien upon the real property

Madi argues that Chief Justice Alexander's points about the differences in statutory terms in RCW 60.04.061 than in RCW 60.04.021 evidencing legislative intent that there are liens upon improvements and liens upon the land was "soundly rejected" by the majority. (Br. of Resp. at 43); see, *Haselwood*, 166 Wn.2d at 507-509. However, the majority in *Haselwood* expressly had to determine whether a mechanic's lien can attach to improvements on property, but not the real property itself. *Id* at 492. The Supreme Court ruled a lien can attach only to improvements. The court also ruled that even though the lien attached only to improvements, because those improvements were "situated" on the land, they had priority over a deed of trust on the land with a later priority date. *Id* at 502, quoting, *Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 887 (2007). Chief Justice Alexander was concerned about this point because he felt the common law rule that improvements by a tenant

become part of the realty is altered by the agreement of the parties, and the concession agreement in *Haselwood* expressly provided that all improvements were personal property, which is not an issue in this case.

Here, unlike *Haselwood*, it is undisputed that the improvements (if the plans were even “improvements”) were never situated upon the land so there was no attachment to the real property. The differences in opinion between the Chief Justice and the majority are not at issue in this case. Rather, the Chief Justice’s points about the legislative intent showing some liens upon improvements and some liens upon lands is not inconsistent with the application of the majority’s holding to our case, where, as here, *no improvements are situated upon the land*. That is, applying the majority’s holding and the dissent’s points leads to the same conclusion in this case-- there is no lien upon the real property with priority.

CONCLUSION

Coastal has shown that there is no genuine issue of material fact that Madi Group has waived any lien they may have had on the real property, therefore summary judgment should enter for Coastal that its deed of trust is in first position on the real property. Alternatively, Madi Group’s lien is only upon the improvements and is subordinated to any deed of trust on the real property under RCW 60.04.031(5) and RCW

60.04.226. Lastly, as pointed out in Coastal's opening brief and above, there are genuine issues of material fact that preclude entering judgment in favor of Madi Group on its motion.

Dated this 10th day of November, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. Ojala", written over a horizontal line.

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APPENDIX A

Authorities

Washington Practice Series TM
Current through the 2010 Pocket PartCreditors' Remedies - Debtors' Relief
Marjorie Dick Rombauer[a0], Pocket Part By Contributing Practice ExpertsChapter
4. Statutory and Common Law Liens
E. Construction Liens**§ 4.51. Background**

Washington statutes provide construction liens for those who work on or provide materials for both private and public construction projects. Provisions for public projects are discussed in §§ [4.87](#) to [4.88](#). The remainder of this subchapter discusses liens for private construction projects, long called mechanics' and materialmen's liens.

In 1991, Washington's comprehensive mechanics' and materialmen's lien statute was repealed and replaced with a revised and recodified law.^[1] A lien on real property for labor or services on timber and lumber was recodified as [RCWA 60.24.033](#). A lien for persons providing land-related engineering services (surveying, mapping, platting, etc.), created in 1931, was incorporated in the comprehensive new law by a 1992 amendment.^[2] The 1992 act also added a provision making certain coercive acts violations of the Consumer Protection Act (CPA).

Decisions under the prior statute are not discussed in this subchapter. They should be relied on only after careful comparison of the statute under which the court was deciding and the language of the equivalent, if any, in the 1991 revisions. In several instances, prior case law is overridden by the revision; some older cases were overridden by former revisions of the 1893 statute.

Liberal construction to provide security for parties intended to be protected is prescribed for all provisions of the new statute except those relating to informational materials on construction lien laws, [RCWA 60.04.250](#) and [RCWA 60.04.255](#), discussed below in [§ 4.85](#), and the provisions relating to formalities like effective date and application.^[3]

The title “mechanics' and materialmen's lien” is still used in the RCWA, but the liens are called by the more inclusive title, “construction liens,” in this subchapter.

[FNa0] Professor Emeritus Of Law, University Of Washington School Of Law.

[FN1] Laws of 1991 ch. 281, RCWA ch. 60.04. The repealed law was adopted in 1893, based on enactments dating back to 1854, and was many times amended. It created liens on real property for the benefit of persons performing labor, furnishing material, and supplying equipment for the construction, alteration or repair of structures on the real property and for clearing, grading and filling land, streets, and roads.

The revised law governs lien claims based on an improvement commenced by a potential lien claimant on or after June 1, 1992. [RCWA 60.04.902](#). All rights acquired and liabilities incurred under the old provisions that

were repealed as part of the 1991 revision were preserved so that actions pending as of June 1, 1992, could proceed under the law as it existed at the time the new statute took effect. RCWA 60.04.904.

[FN2] Laws of 1992 ch. 126.

[FN3] RCWA 60.04.900.

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27 WAPRAC § 4.51

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Washington Practice Series TM
Current through the 2010 Pocket PartCreditors' Remedies - Debtors' Relief
Marjorie Dick Rombauer[a0], Pocket Part By Contributing Practice ExpertsChapter
4. Statutory and Common Law Liens
E. Construction Liens**§ 4.61. Nonvisible professional services—Recording and giving notice to owner**

Recording of notice is permitted for potential lien claimants who are providing professional services where no “improvement” as defined in the statute[1] has been commenced and the professional services provided are not visible from an inspection of the real property.[2] Although the recording is permissive, it should be regarded as mandatory, since if the notice is not recorded, the lien claimed is subordinate to the interest of any subsequent mortgagee[3] and invalid as to the interest of any subsequent purchaser if the mortgagee or purchaser, acting in good faith, for a valuable consideration acquires an interest in the property prior to the commencement of the “improvement” without notice of the professional services being provided.[4]

The notice is to be recorded in the real property records of the county where the property is located.[5]

The lien claimant must also give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to provide this notice to the owner does not result in loss of lien but does result in forfeiture of any right the claimant may have to attorney fees and costs against the owner under RCWA 60.04.181, which provides for application of funds from sale of the property subject to a lien.[6]

The notice must contain the professional service provider's name, address, telephone number, legal description of the property, the owner or reputed owner's name, and the general nature of the professional services provided.[7]

The statute provides a form of notice in RCWA 60.04.031(4), set out below in § 4.62.

[FNa0] Professor Emeritus Of Law, University Of Washington School Of Law.

[FN1] “ ‘Improvement’ means: (a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property;” RCWA 60.04.011(5). Surveying company's staking and marking of property did not constitute an “improvement,” for purposes of statute making unrecorded professional services lien subordinate to interest of mortgagee or purchaser that is acquired prior to commencing an improvement. McAndrews Group, Ltd., Inc. v. Ehmke, 121 Wash. App. 759, 90 P.3d 1123 (Div. 2 2004).

[FN2] RCWA 60.04.031(5).

[FN3] "Mortgagee" is defined to mean a valid mortgage or deed of trust of record, securing a loan. RCWA 60.04.011(8).

[FN4] RCWA 60.04.031(5).

[FN5] RCWA 60.04.031(5).

[FN6] RCWA 60.04.031(5).

[FN7] RCWA 60.04.031(5).

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4.3 WAIVER, LIMITATION, AND MODIFICATION OF LIEN RIGHTS IN THE CONTRACT

This section concentrates on the waiver or modification of lien rights in the contract under which the lienable performance is ordered. However, because waiver or estoppel can occur after contract formation, and because the same principles generally apply to waivers within and after the contract, post-formation waivers are dealt with too. Waiver and estoppel issues are mentioned again in connection with discharge of the lien in section 8.5.4.

In Oregon and Washington a person may modify or waive her right to claim a lien in the contract under which she provides the otherwise lienable performance. Such a modification or waiver of statutory lien rights is valid and enforceable provided that it is voluntary and consensual.⁴² The question of whether a waiver has been given, and the terms of the waiver are matters of interpretation, which require an examination of the language of the contract and the circumstances surrounding its formation.⁴³ In Alaska a waiver of lien rights in the original contract is invalid. In terms of AS 34.35.117(a) a written, signed waiver is effective only as regards performance that occurred prior to the execution of the waiver.⁴⁴ Under AS 34.35.117(b) a natural person employed to do actual labor by the owner or a contractor may not validly waive her lien at all, either before or after performance of the labor.⁴⁵ Accordingly, the discussion

42. *Haskell v. McClintic-Marshall Co.*, 289 F. 405, 410 (9th Cir. 1923); *Boise Payette Lumber Co. v. Dominican Sisters of Ontario*, 102 Or. 314, 319, 202 P. 554 (1921); *Harris v. Dyer*, 50 Or. App. 223, 227-28, 623 P.2d 662, *modified on other grounds*, 292 Or. 233, 637 P.2d 918 (1981); *Den Adel v. Blattman*, 57 Wn. 2d 337, 341, 357 P.2d 159 (1960).

43. *Harder Mech. Contractors, Inc. v. Fairfield Erectors, Inc.*, 278 Or. 613, 616-18, 564 P.2d 1356 (1977); *P&C Constr. Co. v. American Diversified*, 101 Or. App. 51, 54-57, 789 P.2d 688 (1990); *Portland Elec. & Plumbing Co. v. Simpson*, 59 Or. App. 486, 490-91, 651 P.2d 172 (1982). These cases involved waivers subsequent to the original contract, but the principle that the waiver must be interpreted in light of its language and surrounding circumstances is applicable to waivers in the original contract as well.

44. AS 34.35.117(a):

Except as provided under (b) of this section, a written waiver of lien or stop-lending notice of rights created under AS 34.35.050-34.35.120 signed by a claimant requires no consideration and is valid and binding. A waiver permitted under this section may not relate to labor, materials, services or equipment furnished after the date the waiver is signed by the claimant.

45. AS 34.35.117(b):

An individual described in AS 34.35.120(10) may not waive right to claim a lien under AS 34.35.050-34.35.120. A waiver which purports to waive the lien rights of that individual or class of individuals is void.

of waiver in this section applies largely to Oregon and Washington, and is applicable to Alaska only to the extent that it relates to postperformance waivers by persons who are not individual laborers.

A claimant may waive her lien either expressly or by implication. However, an implied waiver of valuable lien rights will not be presumed. Before the words or conduct of a party will be taken to constitute a waiver by implication, the inference of waiver must be clear.⁴⁶ The burden of proving waiver is on the party alleging it.⁴⁷ Lien rights may be waived by implication where the claimant agrees to terms that are, or concludes a separate agreement that is, clearly inconsistent with the right to a lien. Therefore, for example, an agreement to take a mortgage either on the same property or on a different property to secure the amount due for the performance will be a waiver of the lien because a mortgage is regarded, as a matter of law, to be inconsistent with the right to a lien.⁴⁸ The agreement to execute the mortgage waives the lien rights even though the mortgage is never actually executed.⁴⁹

AS 34.35.120(10):

‘Individual’ means a natural person who actually performs labor upon a building or other improvement as an employee of the owner or any contractor furnishing labor, materials, services, or equipment for the construction, alteration or repair of a building or other improvement.

In *Nystrom v. Buckhorn Homes, Inc.*, 778 P.2d 1115, 1122–23 (Alaska 1989), the Alaska Supreme Court interpreted the word “individual” as used in AS 34.35.117 and in other sections of the statute and stressed that the legislative intent is that the term be confined to and encompass natural persons who perform labor as employees.

46. *Nelson v. Cohen*, 160 Or. 336, 338–39, 84 P.2d 658 (1938); *Boise Cascade Corp. v. Distinctive Homes, Inc.*, 67 Wn. 2d 289, 290, 407 P.2d 452 (1965); *Emrich v. Gardner & Hitchings, Inc.*, 51 Wn. 2d 528, 534, 320 P.2d 288 (1958).
47. *Emrich v. Gardner & Hitchings, Inc.*, 51 Wn. 2d 528, 534, 320 P.2d 288 (1958).
48. *Charles K. Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 238–42, 6 P.2d 25 (1932); *Trullinger v. Kofoed*, 7 Or. 228, 231–32 (1879).
49. *Charles K. Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 238–42, 6 P.2d 25 (1932) (provision was included in construction contract that owner would give mortgage to contractor to secure balance due on contract; mortgage was never sought by claimant or executed, and claimant filed mechanics’ lien instead; lien was held to have been waived by mortgage provision, and it was ineffective).

Conversely, other ancillary terms or agreements have been held not to be inconsistent with the lien. For example, an agreement to arbitrate has been found not to be a waiver of lien rights.⁵⁰ Similarly, an agreement to extend credit, or to defer payment,⁵¹ or to accept a promissory note⁵² have been held not to amount to waivers. However, such terms might be treated as a waiver if they defer payment beyond the period within which the lien must be foreclosed.⁵³ A term in the contract under which the contractor undertakes not to permit any liens to attach to the property has been interpreted to refer only to subcontractors' or materialmen's liens, and not to the contractor's own lien. Therefore it does not give rise to an implied waiver of the contractor's own lien because the intent of the provision was to protect the owner against other potential lien claimants, and not to preclude a lien claim by the contractor herself.⁵⁴

Because a lien is a right *in rem*, not *in personam*, its waiver may be used as a defense not only by the party in whose favor it was executed, but also by any other person who has or acquires rights in the property

50. *Harris v. Dyer*, 50 Or. App. 223, 227-28, 623 P.2d 662, *mod. on other grounds*, 292 Or. 233, 637 P.2d 918 (1981). The court reasoned that an arbitration provision was not inconsistent with the claimant's right to a lien because arbitration relates to the method of resolving the amount of the claim, and does not negate the right to secure whatever is found to be due upon resolution of the dispute by arbitration.
51. *Emrich v. Gardner & Hitchings, Inc.*, 51 Wn. 2d 528, 534, 320 P.2d 288 (1958). The court noted that RCW 60.04.100, which regulates the duration of the lien, itself contemplates that credit might be given without damaging the lien, and it in fact permits an extension of the period of the lien where credit is given. ORS 87.055 similarly permits an extension of the duration of the lien where extended payment has been allowed. These sections are discussed in section 6.4.9.
52. *Johnson v. Paulson*, 83 Or. 238, 248, 154 P. 685 (1917); *Trullinger v. Kofoed*, 7 Or. 228, 231 (1879); *Boise Cascade Corp. v. Distinctive Homes, Inc.*, 67 Wn. 2d 289, 292-93, 407 P.2d 452 (1965). RCW 60.04.140 expressly states that the taking of a note or other evidence of indebtedness will not discharge the lien unless the contrary is specified.
53. *Trullinger v. Kofoed*, 7 Or. 228, 231 (1879).
54. *Nelson v. Cohen*, 160 Or. 336, 338-39, 84 P.2d 658 (1938).

interest which would have been subject to the lien.⁵⁵ However, the fact that a waiver may be asserted by a person who was not a party to the contract does not mean that a claimant can be bound to a waiver executed by someone else. A party is bound only by her own waiver and she cannot be deprived of her lien rights except by her own contract. Therefore a subcontractor or materialman cannot be bound by a waiver of lien rights agreed to between the owner and the contractor who ordered work from her.⁵⁶ This is true even if the claimant knew at the time that she entered into the contract with the contractor that the contractor had waived all liens arising out of the construction. Mere knowledge, without clear evidence of acquiescence in the waiver will not be enough to bind the claimant.⁵⁷

In addition to waiver, the doctrine of estoppel may be used to preclude the assertion of a lien by a claimant who has conducted herself in a way that induces the owner or some third party to rely reasonably on the fact that she asserts no lien, and to act to her detriment on the basis of that reliance.⁵⁸

Apart from waiving the lien in its entirety, the contract may regulate or qualify the claimant's lien rights. As discussed in the next section, for example, the very specification of the claimant's performance duties are

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55. *Den Adel v. Blattman*, 57 Wn.2d 337, 341, 357 P.2d 159 (1960). This case involved a waiver given by a contractor to a bank that financed the construction. The waiver was given as a condition of receiving payments from the bank for the work. The contractor and the owner had agreed that the owner would pay the contractor a sum in addition to that received from the bank. When the contractor claimed a lien for that sum against the owner, the court held that the lien had been waived. Although the contractor had waived the lien in favor of the bank and not the owner, the court held that the waiver discharged any lien rights against the owner too because the lien is a right in rem and not in personam. Compare *Charles K. Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 242, 6 P.2d 25 (1932) in which the court treated the waiver in favor of an owner as the basis of an estoppel in favor of a mortgagee who had known about the waiver and had relied on it to its detriment. Because estoppel requires a showing of reasonable reliance and detriment by the third party, waiver would appear to be an easier defense.
56. *Myers v. Strowbridge Estate Co.*, 82 Or. 29, 38-40, 160 P. 135 (1916); *Oregon Lumber & Fuel Co. v. Nolan*, 75 Or. 69, 76-77, 143 P. 935 (1915); *Zanello & Son v. Portland Central Heating Co.*, 70 Or. 69, 75-76, 139 P. 572 (1914); *Hume v. Seattle Dock Co.*, 68 Or. 477, 480-83, 137 P. 752 (1914).
57. *Myers v. Strowbridge Estate Co.*, 82 Or. 29, 38-40, 160 P. 135 (1916).
58. *Zanello & Son v. Portland Central Heating Co.*, 70 Or. 69, 77, 139 P. 572 (1914); *Charles K. Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 242, 6 P.2d 25 (1932). See also section 8.5.3.

a form of qualification of the claimant's lien rights because proper and substantial performance in the manner specified is a prerequisite to the claimant's right to a lien. The contract may contain prerequisites in addition to those performance obligations. For example, it may specify that all orders for extra work or materials be in writing. In that case, unless a waiver of the writing requirement is shown,⁵⁹ the lien will only cover additional performance ordered in writing.⁶⁰ In general, any modification or qualification of lien rights that does not purport to override the mandatory provisions of the statute (as, for example, the perfection requirements which relate to the lien's validity against third parties) will be enforceable if validly agreed to under the law of contracts.

4.4 THE EFFECT ON THE LIEN OF THE CLAIMANT'S BREACH OF CONTRACT

4.4.1 The General Principle: A Lien is Premised on Proper Performance

A mechanics' lien is security only for a valid claim.⁶¹ It is therefore necessary for the claimant to plead and prove that the performance for which the lien is claimed was executed in a proper and workmanlike manner.⁶² Where the lien is claimed by a contractor, she must show that the performance complied with the contract concluded between her and

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59. Of course, once the extras have been supplied at the instance of the owner, the waiver of the writing requirement will be fairly easy to find. *Swenson v. Lowe*, 5 Wn. App. 186, 188-89, 486 P.2d 1120 (1971).
60. *Ellis Mylroie Lumber Co. v. Bratt*, 119 Wn. 142, 153, 205 P. 398 (1922).
61. *Potter v. Davidson*, 143 Or. 101, 106, 20 P.2d 409 (1933). See also the cases cited in note 68, *infra*.
62. *Anderson v. Chambliss*, 199 Or. 400, 406, 262 P.2d 298 (1953); *Morrison-Knudsen Co., Inc. v. Porter Peringer, Inc.*, 262 Or. 216, 217, 497 P.2d 370 (1972); *Lundberg v. The Corp. of the Catholic Archbishop of Seattle*, 55 Wn. 2d 77, 346 P.2d 164 (1959).

the owner.⁶³ In the case of a subcontractor or materialman who is not in contractual privity with the owner, the contractual undertakings of the parties do not have the same direct relevance. The subcontractor or materialman does not have to show that the contractor had complied with her contract with the owner,⁶⁴ and the precise terms of the subcontractor's or materialman's contract with the contractor will not necessarily be relevant to the remote claimant's lien rights against the owner. Notwithstanding, the subcontractor or materialman cannot claim a lien for defective work, and the adequacy of her performance must be measured. Because the determination of a subcontractor's or materialman's lien rights involves this extra complication, the effect of the contractor's breach is discussed first.

4.4.2 The Contractor's Breach

As mentioned before, a contractor who claims a lien for her performance must prove that she has complied with her contract. If the contractor has breached the contract, the owner may raise the defense of improper performance in a suit to foreclose the lien and she may also counterclaim for any damages occasioned by the defective performance.⁶⁵ Where a contractor fails to complete the work, but the abandonment was justified as a result of the owner's breach or repudiation of the contract (for example, the failure to pay for completed stages of the work), the contractor will be entitled to a lien for the work

63. *E.g.*, in *Whitney v. McKay*, 54 Wn. 2d 672, 677-78, 344 P.2d 497 (1959), the owner contended that the contractor had failed to complete her contract and was therefore not entitled to a lien. The contract was a cost-plus-10% contract, and it did not clearly define what the complete work was to be. The court therefore held that the claimant could not be said to be in breach for failure to complete the work allegedly required, and was entitled to recover for the work done.

64. *See* section 4.4.3.

65. *Johnson v. Thompson Construction*, 1 Wn. App. 194, 195-96, 460 P.2d 291 (1969); *American Plumbing & Steam Supply Co. v. Alavekiu*, 154 Wn. 436, 443-44, 282 P. 917 (1929).

lacks any guarantee from the seller about the validity of the title. See *BARGAIN AND SALE*. [Cases: Deeds ⇨22. C.J.S. *Deeds* § 16.]

composition deed. A deed reflecting the terms of an agreement between a debtor and a creditor to discharge or adjust a debt. [Cases: Debtor and Creditor ⇨10. C.J.S. *Assignments for Benefit of Creditors* § 26; *Creditor and Debtor* §§ 84–94.]

counterdeed. A secret deed, executed either before a notary or under a private seal, that voids, invalidates, or alters a public deed.

deathbed deed. *Rare.* A deed executed by a grantor shortly before death. • The grantor need not be aware that he or she is near death when the deed is executed.

deed absolute. See *absolute deed*.

deed in fee. A deed conveying the title to land in fee simple, usu. with covenants.

deed in lieu of foreclosure. A deed by which a borrower conveys fee-simple title to a lender in satisfaction of a mortgage debt and as a substitute for foreclosure. • This deed is often referred to simply as “deed in lieu.” [Cases: Mortgages ⇨293. C.J.S. *Mortgages* §§ 441–443.]

deed of covenant. A deed to do something, such as a document providing for periodic payments by one party to another (usu. a charity) for tax-saving purposes. • The transferor can deduct taxes from the payment and, in some cases, the recipient can reclaim the deducted tax.

deed of distribution. A fiduciary’s deed conveying a decedent’s real estate.

deed of gift. A deed executed and delivered without consideration. — Also termed *gratuitous deed*.

deed of inspectorship. *Hist.* An instrument reflecting an agreement between a debtor and creditor to appoint a receiver to oversee the winding up of the debtor’s affairs on behalf of the creditor.

deed of partition. A deed that divides land held by joint tenants, tenants in common, or coparceners. [Cases: Partition ⇨96. C.J.S. *Partition* §§ 141–142.]

deed of release. A deed that surrenders full title to a piece of property upon payment or performance of specified conditions.

deed of separation. An instrument governing a spouse’s separation and maintenance. [Cases: Husband and Wife ⇨278.]

deed of settlement. 1. A deed to settle something, such as the distribution of property in a marriage. 2. *English law.* A deed formerly used to form a joint-stock company.

deed of trust. A deed conveying title to real property to a trustee as security until the grantor repays a loan. • This type of deed resembles a mortgage. — Also termed *trust deed*; *trust indenture*; *indemnity mortgage*. — Also termed *common-law mortgage*. [Cases: Mortgages ⇨8. C.J.S. *Mortgages* §§ 5–6, 10.]

deed poll. A deed made by and binding on only one party, or on two or more parties having similar interests. • It is so called because, traditionally, the parchment was “polled” (that is, shaved) so that it would be even at the top (unlike an indenture). — Also spelled *deed-poll*. Cf. *INDENTURE*.

deed to lead uses. A common-law deed prepared before an action for a fine or common recovery to show the object of those actions.

deed without covenants. See *quitclaim deed*.

defeasible deed. A deed containing a condition subsequent causing title to the property to revert to the grantor or pass to a third party.

derivative deed. See *secondary conveyance* under *CONVEYANCE*.

disentailing deed. *Hist.* A tenant in tail’s assurance that the estate tail will be barred and converted into an estate in fee. • The Fines and Recoveries Act (3 & 4 Will. 4 ch. 74) introduced this way of barring an entail. It authorized nearly every tenant in tail, if certain conditions were met, to dispose of the land in fee simple absolute and thus to defeat the rights of all persons claiming under the tenant.

donation deed. A deed granted by the government to a person who either satisfies the statutory conditions in a donation act or redeems a bounty-land warrant. See *DONATION ACT*; *BOUNTY-LAND WARRANT*.

full-covenant-and-warranty deed. See *warranty deed*.

general warranty deed. See *warranty deed*.

gift deed. A deed given for a nominal sum or for love and affection.

good deed. A deed that conveys good title as opposed to a deed that is merely good in form. — Also termed *lawful deed*.

grant deed. A deed containing, or having implied by law, some but not all of the usual covenants of title; esp., a deed in which the grantor warrants that he or she (1) has not previously conveyed the estate being granted, (2) has not encumbered the property except as noted in the deed, and (3) will convey to the grantee any title to the property acquired after the date of the deed.

gratuitous deed. See *deed of gift*.

inclusive deed. See *inclusive grant* under *GRANT*.

indented deed. See *INDENTURE* (2).

latent deed. A deed kept in a strongbox or other secret place, usu. for 20 years or more.

lawful deed. See *good deed*.

mineral deed. A conveyance of an interest in the minerals in or under the land. [Cases: Mines and Minerals ⇨55. C.J.S. *Mines and Minerals* §§ 158–160, 169.]

mortgage deed. The instrument creating a mortgage. • A mortgage deed typically must contain (1) the name of the mortgagor, (2) words of grant or conveyance, (3) the name of the mortgagee, (4) a property description sufficient to identify the mortgaged premises, (5) the mortgagor’s signa-

able than is power of sale foreclosure to such attacks and, as a result, produces a more stable title. There are at least three reasons for this. First, because judicial foreclosure is under court supervision, that very fact will prevent many of the above defects from arising. After all, in the power of sale setting, the mortgagee or the trustee normally controls the steps through foreclosure. Judicial foreclosure, on the other hand, entails judicial second guessing prior to and after the sale. Not only are fewer defects likely to arise when a disinterested party is, in theory, double-checking the process, but the mere presence of the judge may discourage the more overt and intentional defects that may otherwise occur. Second, because judicial foreclosure is an adversary proceeding, the other parties aid the court in calling its attention to potential defects, a second type of check on the mortgagee not found in power of sale foreclosure. Finally, even if defects do go uncorrected, the normal concepts of judicial finality provide the ultimate insulation from attack for a judicial foreclosure decree.³ If a party in a judicial foreclosure who feels aggrieved by the trial court's action allows the time period for filing objections with the trial court or for appeal to expire, her chances for a successful collateral attack on the foreclosure proceeding are extremely slim.⁴ Indeed, in one recent case where a mortgagor did just that, the reaction of the court is illustrative: "Clearly she knew or should have known the manner in which her real estate was advertised, offered, and sold by the time the period for filing objections expired. Judicial sales must have finality and judgment debtors may not assert untimely challenges on the basis of irregularities which were readily ascertainable before the close of

³Chemical Bank v. McGill, 262 A.D.2d 131, 693 N.Y.S.2d 8 (1999) (when mortgagee seeks possession after a foreclosure sale, mortgagor's claims based on "fraud in the procurement of the mortgage, irregularities in the foreclosure sale and deprivation of constitutional rights in the foreclosure action, are precluded as a matter of res judicata by the unappealed judgment of foreclosure."); Dauphin Deposit Bank and Trust Company v. Tenny, 355 Pa.Super. 338, 513 A.2d 459 (1986) (mortgagor held estopped from relitigating in a declaratory judgment action whether the mortgage debt had been paid and the mortgage had been forged, where the latter issues had been determined earlier in a mortgage foreclosure action); Shuput v. Lauer, 109 Wis.2d 164, 325 N.W.2d 321 (1982). See also Zeballos v. Zeballos,

104 A.D.2d 1033, 481 N.Y.S.2d 11 (1984).

⁴See, e.g., Federal National Mortgage Assoc. v. Citiano, 834 A.2d 645 (Pa.Super.2003) (failure to provide notice of postponement of foreclosure sale to mortgagor could be raised only on direct review of foreclosure judgment and not in mortgagee's ejectment action); L.P.P. Mortgage, Ltd., v. Hayse, 87 P.3d 976 (Kan.App.2004) ("If we were to permit a collateral attack upon a foreclosure judgment by addressing foreclosure-type rulings when we decide an appeal from an order confirming a sheriff's sale, we would gut the entire sheriff's sale process."); HomeEq Servicing Corp. v. Baker, 863 N.E.2d 1262 (Ind.App.2007); Chemical Bank v. McGill, 262 A.D.2d 131, 693 N.Y.S.2d 8 (1999).

the statutory period for filing objections.⁵ Moreover, if there is an appeal, the ultimate foreclosure judgment will have even more finality. Indeed, one of the few defects that will not so easily be cured by the passage of time is the omitted party problem we considered in a preceding section.⁶ An omitted junior lienor, as a necessary party not bound by the judicial foreclosure, can, of course, collaterally attack the validity of that foreclosure even after the time periods for direct review have expired. In any event, with power of sale foreclosure, the security of judicial finality is simply absent. While the passage of time inevitably will help a defective title derived from a power of sale foreclosure, it is largely by means of variable and unreliable concepts such as statutes of limitations, laches and related notions.

E. POWER OF SALE FORECLOSURE

§ 7.19 General considerations

The other main foreclosure method, permitted in about sixty percent of the jurisdictions, is power of sale foreclosure.¹ After varying types and degrees of notice, the property is sold at a public sale, either by a public official, such as a sheriff, by some other third party, or by the mortgagee.

In some states utilizing the power of sale method, the deed of trust is the most commonly used mortgage instrument. The mortgagor-trustor conveys the real estate to a trustee who holds

⁵Federal National Mortgage Assoc. v. Citiano, 834 A.2d 645 (Pa. Super.2003); Virgin Islands National Bank v. Tyson, 506 F.2d 802, 805 (3d Cir.1974), certiorari denied 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975). See Rott v. Connecticut General Life Ins. Co., 478 N.W.2d 570 (N.D.1991), certiorari denied 504 U.S. 959, 112 S.Ct. 2313, 119 L.Ed.2d 233 (1992), rehearing denied 505 U.S. 1238, 113 S.Ct. 11, 120 L.Ed.2d 939 (1992) ("Although erroneous rulings of the trial court in this area of the law provide grounds for reversal on direct appeal * * *, we have generally refused to find that violations of our foreclosure laws and manner-of-sale laws render foreclosure proceedings void or jurisdictionally defective in the sense that such violations may be challenged at any time."); Gray v. Bankers Trust Co. of Albany, N.A., 82 A.D.2d 168, 442 N.Y.S.2d 610 (1981), appeal denied

58 N.Y.2d 604, 459 N.Y.S.2d 1026, 445 N.E.2d 654 (1983); Milwaukee Western Bank v. Cedars of Cedar Rapids, Inc., 170 N.W.2d 670 (Iowa 1969).

⁶See § 7.15, supra.

[Section 7.19]

¹There are over 30 jurisdictions in which power of sale foreclosure is authorized and used. These include Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Guam, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming. See generally, Jones and Ivens, Power of Sale Foreclosure in Tennessee: A Section 1983 Trap, 51 Tenn.L.Rev. 279, 293-294 (1984).

the property in trust for the mortgagee-beneficiary until full payment of the mortgage debt. In the event of foreclosure, the power of sale is exercised by the trustee, who holds a public sale of the mortgaged property; the sale is usually not judicially supervised.

As previously indicated, the notice requirements under power of sale foreclosure vary, but are usually less rigorous than those associated with judicial foreclosure. Notice, as used here, may be simply notice of foreclosure or notice of default or a combination of the two. While some states require that notice by mail or personal service be provided for any person having a record interest in the real estate junior to the mortgage being foreclosed,² many do not. A few states require only notice of publication.³ This publication sometimes takes the form of newspaper advertisement and sometimes consists only of public posting. Other states, in addition to published notice, require notice either by mail or personal service to the mortgagor and the owner of the mortgaged real estate, but not to junior lienors and others holding an interest subordinate to the mortgage being foreclosed.⁴ A few states attempt to protect those interested parties who are neither mortgagors nor owners by requiring that the notice of foreclosure be mailed to any person who has previously recorded a request for such notice.⁵ In any event, whatever the notice requirements of the foregoing statutes, federal legislation makes power of sale foreclosure ineffective against a junior federal tax lien unless written notice is provided to the United States at least 25 days prior to the sale by registered or certified mail or by

²See, e.g., Alaska Stat. § 34.20.070; Ariz.Rev.Stat. § 35-809(B); West's Colo.Rev.Stat. Ann. § 38-37-113(2), (3); Idaho Code § 45-1506; West's Rev.Code Wash. Ann. § 61.24.040; West's Rev.Codes Mont. § 93-6005.

³See, e.g., Official Code Ga. Ann. §§ 9-13-141, 44-14-162, 44-14-162.2, 44-14-162.3 (nonresidential mortgages); Miss.Code 1972, § 89-1-55.

⁴See, e.g., D.C.Code § 45-615; V.A.M.S. § 443.325; V.T.C.A., Prop.Code § 51.002 (mailed notice to each "debtor" only). Compare Minn.Stat. Ann. § 580.03 (personal service on person in possession only). For an example of who is a person in possession, see *Farm Credit Bank of St. Paul v. Kohnen*, 494 N.W.2d 44 (Minn. App.1992); *Varco-Pruden Buildings v. Becker & Sons Construction, Inc.*, 361

N.W.2d 457 (Minn.App.1985).

A few states require mailed (registered or certified) notice to the "mortgagor" the record "owner" and "any person having a lien" on the mortgaged real estate. See N.H.Rev. Stat. Ann. 479:25. The term "owner," however, is interpreted broadly to include recorded lessees. See *Snyder v. New Hampshire Savings Bank*, 134 N.H. 32, 592 A.2d 506 (1991).

⁵See, e.g., V.A.M.S. § 443.325. Some states combine required mailed notice to all parties having record interest in the real estate together with mailed notice to any other person who has previously recorded a request for it. See, e.g., Ariz.Rev.Stat. § 33-809; West's Ann. Cal. Civ. Code § 2924(b).

personal service.⁶ Finally, almost no power of sale foreclosure statutes provide for an opportunity for a hearing prior to the foreclosure sale.⁷

The Uniform Land Transactions Act (ULTA)⁸ authorizes power of sale foreclosure under methods not unlike many of those used in state statutes. After default, a minimum of five weeks must expire before the mortgagee officially notifies the mortgagor of its intent to foreclose.⁹ After this official notice, there is an additional minimum three week grace period, after which the mortgagee must inform the mortgagor which default remedy it intends to use.¹⁰ If the mortgagee chooses power of sale foreclosure, there is a requirement of mailed notice to the debtor and to all other parties whose interests would be cut off by foreclosure.¹¹ If a mortgagor qualifies as a "protected party", basically a person who is an owner-occupant of a residence, certain notice requirements and other protections are somewhat more substantial.¹²

Two federal statutes authorize power of sale foreclosure of all residential mortgages held by the Housing and Urban Development Department ["HUD"]. One is the Multifamily Mortgage Foreclosure Act of 1981 (the "Multifamily Act") which authorizes a nonjudicial power of sale foreclosure for federally-insured and certain other mortgages on property other than one-to-four family dwellings held by the Secretary of HUD.¹³ The other statute is the Single Family Mortgage Foreclosure Act of 1994 (the "Single Family Act") which does the same for HUD-held mortgages on one-to-four family dwellings.¹⁴ The provisions of the two Acts are similar. Regulations implementing both Acts were streamlined and consolidated in one regulation in 1996.¹⁵

Foreclosure under the Acts is initiated by service of a Notice of Default and Foreclosure Sale containing information concerning

⁶See 26 U.S.C.A. § 7425(b) and (c); *Southern Bank of Lauderdale County v. Internal Revenue Service*, 770 F.2d 1001 (11th Cir.1985).

⁷North Carolina uses power of sale foreclosure, but provides for a hearing before a clerk of court. See N.C.Gen.Stat. § 45-21.16. In Colorado, the public trustee must obtain a court order authorizing the trustee's sale. See West's Colo.Rev.Stat. Ann. § 38-37-140; Colo.Rule 120.

⁸The Uniform Land Transactions Act was approved by the National Conference of Commissioners on Uniform State Laws in August, 1975 and recommended for enactment in all of the states. It was amended substan-

tially in 1977, although these amendments for the most part did not effect the foreclosure sections. The foreclosure provisions are now also part of the Uniform Land Security Interest Act ("ULSIA"). No state thus far has adopted the ULTA in whole or in part.

⁹U.L.T.A. § 3-505.

¹⁰U.L.T.A. § 3-508.

¹¹U.L.T.A. § 3-508(a).

¹²See U.L.T.A. §§ 3-505, 3-507.

¹³See 12 U.S.C.A. §§ 3701 to 3717.

¹⁴See 12 U.S.C.A. §§ 3751 to 3758.

¹⁵See 24 C.F.R. §§ 27.1 to 27.123, 61 Fed.Reg. 48546 (1996).

the property being foreclosed, the date and place of sale and related information.¹⁶ This notice must be published once a week for three consecutive weeks and posted on the property for at least seven days prior to the sale.¹⁷ In addition, it must be sent by certified mail, return receipt requested, at least twenty-one days before the date of foreclosure sale to the original mortgagor, to those liable on the mortgage debt and to the "owner" of the property and, at least ten days before the sale, to all persons having liens thereon.¹⁸ Unless one takes a broad view of who is an "owner" under the statute, neither the Acts nor the Regulations promulgated thereunder require that mailed notice be provided to holders of leases, easements and similar interests junior to the mortgage being foreclosed. Finally, though the Acts themselves make no provision for a hearing, the Regulation under the Multifamily Act specifies that "HUD will provide to the mortgagor [and current owner] an opportunity informally to present reasons why the mortgage should not be foreclosed. Such opportunity may be provided before or after the designation of the foreclosure commissioner but before service of the notice of default and foreclosure."¹⁹

The underlying theory of power of sale foreclosure is simple. It is that by complying with the above type statutory requirements, the mortgagee accomplishes the same purposes achieved by judicial foreclosure without the substantial additional burdens that the latter type of foreclosure entails. Those purposes are to terminate all interests junior to the mortgage being foreclosed and to provide the sale purchaser with a title identical to that of the mortgagor as of the time the mortgage being foreclosed was executed.²⁰ Moreover, where it is in common use, power of sale foreclosure has provided an effective foreclosure remedy with a cost in time and money substantially lower than that of its judicial foreclosure counterpart.²¹

Notwithstanding the fact that power of sale foreclosure generally works and that it is more efficient and less costly than

¹⁶12 U.S.C.A. §§ 3706, 3757; 24 C.F.R. 27.15, 27.103.

¹⁷12 U.S.C.A. § 3708, 3758(3); 24 C.F.R. 27.15, 27.103.

¹⁸12 U.S.C.A. § 3708(2)(3); 24 C.F.R. 27.15(c), 27.103.

¹⁹24 C.F.R. 27.5(b). For an analysis of the Acts and post-1994 Congressional attempts to expand their coverage to other federally-held mortgages, see Randolph, *The New Federal Foreclosure Laws*, 49 Okla.L.Rev. 123 (1996).

²⁰See e.g., Alaska Stat. 34.20.090(a) which provides: "The sale and conveyance transfers all title and interest which the party executing the deed of trust had in the property sold at the time of its execution, together with all title and interest he may have acquired before the sale * * *"; *Olvera v. Johnson*, 609 N.W.2d 432, 435-36 (N.D.2000). See § 7.12 supra.

²¹See McElhone & Cramer, *Loan Foreclosure Costs Affected By Varied State Regulations*, 36 Mortgage Banker 41 (1975).

judicial foreclosure, the titles it produces have been somewhat less stable than those resulting from judicial foreclosure. As we noted earlier, there are at least three reasons for this.²² First, the court supervision involved in judicial foreclosure will prevent many defects from arising. Second, because judicial foreclosure is an adversary proceeding, the presence of other parties who will bring possible defects to the court's attention constitutes added protection against a faulty end product. Finally, the concept of judicial finality provides substantial insulation against subsequent collateral attack even on technically defective judicial foreclosure proceedings. None of these protections are inherent in power of sale foreclosure. Moreover, as we will examine in detail later in this chapter, power of sale foreclosure has been subjected recently to the further uncertainty of constitutional attack because of its alleged notice and hearing deficiencies.²³

§ 7.20 Defective power of sale foreclosure—The “void-voidable” distinction

While we examine in detail in the next section a variety of defects that provide grounds for setting aside power of sale foreclosures, it is important initially to consider those defects from a broader perspective. Generally, defects in the exercise of a power of sale can be categorized in at least three ways. Some defects are so substantial as to render the sale void. In this situation no title, legal or equitable, passes to the sale purchaser or subsequent grantees, except perhaps by adverse possession.¹ Such a result typically occurs where, notwithstanding mortgagee compliance with the prescribed foreclosure procedure, there was no right to exercise the power of sale.² A forged mortgage, for example, would fall into this category. The most common example, however, of a defect that would render a sale void is

²²See § 7.18, *supra*.

²³See §§ 7.23 to 7.30, *infra*.

[Section 7.20]

¹*Deep v. Rose*, 234 Va. 631, 364 S.E.2d 228 (1988) (where a defect renders a sale void, “no title, legal or equitable, passes to the purchaser.”); *Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617 (Tex.Civ.App. 1979), error refused *n.r.e.*; *Dingus, Mortgages—Redemption After Foreclosure Sale in Missouri*, 25 Mo.L.Rev. 261, 277 (1960); *Tiffany, Real Property*, § 1552 (3d Ed. 1939). But cf. *Phillips v. Latham*, 523 S.W.2d 19 (Tex.Civ. App.1975), error refused *n.r.e.*, appeal

after remand 551 S.W.2d 103 (Tex.Civ. App.1977).

²*Staffordshire Investments Inc. v. Cal-Western Reconveyance Corp.*, 149 P.3d 15 (Ore.App.2006) (sale held contrary to the terms of a valid forbearance agreement deemed void); *Rosenberg v. Smidt*, 727 P.2d 778 (Alaska 1986) (“only substantial defects such as a lack of substantive basis to foreclose in the first place will make a sale void.”); *Graham v. Oliver*, 659 S.W.2d 601, 603 (Mo.App.1983). But see *Bottomly v. Kabachnick*, 13 Mass.App.Ct. 480, 434 N.E.2d 667 (1982), review denied 386 Mass. 1103, 440 N.E.2d 1176 (1982) (sale void even

▽

Supreme Court of the United States
 CONNECTICUT and John F. DiGiovanni, Petitioners,
 v.
 Brian K. DOEHR.
 No. 90-143.

Argued Jan. 7, 1991.
 Decided June 6, 1991.

Property owner brought suit alleging that Connecticut's ex parte attachment procedure violated his constitutional right of due process. The United States District Court for the District of Connecticut, 716 F.Supp. 58, Warren W. Egington, J., dismissed the complaint, and owner appealed. The Court of Appeals for the Second Circuit, 898 F.2d 852, George C. Pratt, Circuit Judge, reversed and remanded, and amended on rehearing, 907 F.2d 17. The State petitioned for certiorari. The Supreme Court, Justice White, held that state statute authorizing prejudgment attachment of real estate without prior notice or hearing and without requiring a showing of exigent circumstances did not satisfy due process requirements.

Affirmed and remanded.

Chief Justice Rehnquist filed a concurring opinion in which Justice Blackmun joined.

Justice Scalia filed an opinion concurring in part and concurring in judgment.

West Headnotes

[1] Attachment 44 ↪ 2

44 Attachment

44I Nature and Grounds

44I(A) Nature of Remedy, Causes of Action, and Parties

44k2 k. Constitutional and statutory provisions.

Most Cited Cases

Constitutional Law 92 ↪ 4481

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4481 k. Attachment. Most Cited Cases

(Formerly 92k312(2))

In determining whether a state prejudgment attachment statute violated due process, a court must consider the private interest that will be affected by the prejudgment measure, examine the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards, and give principal attention to the interest of the party seeking the prejudgment remedy with due regard for any ancillary interest government may have in providing the procedure or foregoing the added burden of providing greater protections. U.S.C.A. Const.Amend. 14.

[2] Attachment 44 ↪ 1

44 Attachment

44I Nature and Grounds

44I(A) Nature of Remedy, Causes of Action, and Parties

44k1 k. Nature and purpose of remedy. Most Cited Cases

Attachment affects significant property interests by ordinarily clouding title, impairing the ability to sell or otherwise alienate the property, tainting credit ratings, reducing the chance of obtaining a home equity loan or additional mortgage or placing an existing mortgage in technical default where there is an insecurity clause.

[3] Constitutional Law 92 ↪ 4416

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities

92k4415 Liens, Mortgages, and Security Interests

92k4416 k. In general. Most Cited Cases

(Formerly 92k300(1))

Constitutional Law 92 ↪ 4480

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4480 k. In general. Most Cited Cases
(Formerly 92k312(2))

Constitutional Law 92 ↪ 4481

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4481 k. Attachment. Most Cited Cases
(Formerly 92k312(2))

Temporary or partial impairments to property rights entailed by attachments, liens, and similar encumbrances are sufficient to merit due process protection, even though they do not amount to complete, physical, or permanent deprivation of real property. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ↪ 4481

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4481 k. Attachment. Most Cited Cases
(Formerly 92k312(2))

State procedures for creating and enforcing attachments are subject to the strictures of due process. U.S.C.A. Const.Amend. 14.

[5] Attachment 44 ↪ 2

44 Attachment

44I Nature and Grounds

44I(A) Nature of Remedy, Causes of Action, and Parties

44k2 k. Constitutional and statutory provisions.
Most Cited Cases

Constitutional Law 92 ↪ 4481

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4481 k. Attachment. Most Cited Cases
(Formerly 92k312(2))

Statute authorizing prejudgment attachment of real estate without prior notice or hearing posed a substantial risk of erroneous deprivation of property, even if provision required plaintiff to demonstrate and the judge to find probable cause to believe that judgment would be rendered in favor of plaintiff. C.G.S.A. § 52-278e; U.S.C.A. Const.Amend. 14.

[6] Attachment 44 ↪ 2

44 Attachment

44I Nature and Grounds

44I(A) Nature of Remedy, Causes of Action, and Parties

44k2 k. Constitutional and statutory provisions.
Most Cited Cases

Constitutional Law 92 ↪ 4481

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4481 k. Attachment. Most Cited Cases
(Formerly 92k312(2))

Statute authorizing prejudgment attachment of real estate without prior notice or hearing and without requiring a showing of exigent circumstances did not satisfy due process requirements for safeguards against erroneous deprivation of property, notwithstanding the fact that statute provided expeditious postattachment adversary hearing, notice for such hearing, judicial review of an adverse decision and double damages action if original suit was

commenced without probable cause, particularly in tort case involving an alleged assault, rather than an issue ordinarily lending itself to documentary proof. C.G.S.A. §§ 52-46, 52-278e(b, c), 52-278l (a), 52-568(a)(1); Conn. Practice Book 1978, § 114; U.S.C.A. Const.Amend. 14.

[7] Attachment 44 ↪40

44 Attachment

44I Nature and Grounds

44I(B) Grounds of Attachment

44k39 Fraudulent Transfer or Other Disposition of Property

44k40 k. In general. Most Cited Cases

Tort plaintiff's interest in ensuring availability of assets to satisfy his judgment if he prevailed on merits of his civil assault and battery action was insufficient to justify ex parte attachment of his opponent's real property absent any allegation that opponent was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. U.S.C.A. Const.Amend. 14; C.G.S.A. § 52-278e.

[8] Attachment 44 ↪2

44 Attachment

44I Nature and Grounds

44I(A) Nature of Remedy, Causes of Action, and Parties

44k2 k. Constitutional and statutory provisions.

Most Cited Cases

Constitutional Law 92 ↪4481

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4481 k. Attachment. Most Cited Cases

(Formerly 92k312(2))

State's interests in attachment procedure were not sufficient to justify risk of erroneous deprivation of property posed by state statute authorizing prejudgment attachment of real estate without prior notice or hearing and without a showing of exigent circumstances; the tort plaintiff's interest was de minimis and State could not seriously plead

additional financial or administrative burdens involving predeprivation hearings when it claimed to provide an immediate postdeprivation hearing. C.G.S.A. § 52-278e(b, c); U.S.C.A. Const.Amend. 14.

[9] Attachment 44 ↪1

44 Attachment

44I Nature and Grounds

44I(A) Nature of Remedy, Causes of Action, and Parties

44k1 k. Nature and purpose of remedy. Most Cited Cases

Prejudgment attachment is a remedy unknown at common law.

[10] Trial 388 ↪21

388 Trial

388III Course and Conduct of Trial in General

388k21 k. Presence of parties and counsel. Most Cited Cases

Disputes between debtors and creditors more readily lend themselves to accurate ex parte assessments of the merits, while tort actions do not.

[11] Attachment 44 ↪2

44 Attachment

44I Nature and Grounds

44I(A) Nature of Remedy, Causes of Action, and Parties

44k2 k. Constitutional and statutory provisions. Most Cited Cases

Constitutional Law 92 ↪4481

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4481 k. Attachment. Most Cited Cases

(Formerly 92k312(2))

Connecticut statute authorizing prejudgment attachment of real estate which did not provide preattachment hearing or require showing of some exigent circumstances, did not satisfy due process requirements. U.S.C.A. Const.Amend.

14; C.G.S.A. § 52-278e.

****2107 Syllabus** ^{FN*}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*1 A Connecticut statute authorizes a judge to allow the prejudgment attachment of real estate without prior notice or hearing upon the plaintiff's verification that there is probable cause to sustain the validity of his or her claim. Petitioner DiGiovanni applied to the State Superior Court for such an attachment on respondent Doehr's home in conjunction with a civil action for assault and battery that he was seeking to institute against Doehr in the same court. The application was supported by an affidavit in which DiGiovanni, in five one-sentence paragraphs, stated that the facts set forth in his previously submitted complaint were true; declared that the assault by Doehr resulted in particular injuries requiring expenditures for medical care; and stated his "opinion" that the foregoing facts were sufficient to establish probable cause. On the strength of these submissions, the judge found probable cause and ordered the attachment. Only after the sheriff attached the property did Doehr receive notice of the attachment, which informed him of his right to a postattachment hearing. Rather than pursue this option, he filed a suit in the Federal District Court, claiming that the statute violated the Due Process Clause of the Fourteenth Amendment. That court upheld the statute, but the Court of Appeals reversed, concluding that the statute violated due process because, *inter alia*, it permitted *ex parte* attachment absent a showing of extraordinary circumstances, see, e.g., *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, and the nature of the issues at stake in this case increased the risk that attachment was wrongfully *2 granted, since the fact-specific event of a fist fight and the question of assault are complicated matters that do not easily lend themselves to documentary proof, see *id.*, at 609-610, 94 S.Ct., at 1901.

Held: The judgment is affirmed.

898 F.2d 852 (CA 2 1990), affirmed.

Justice WHITE delivered the opinion of the Court with respect to Parts I, II, and III, concluding that:

1. Determining what process must be afforded by a state statute enabling an individual to enlist the State's aid to deprive another of his or her property by means of a prejudgment attachment or similar procedure requires (1) consideration of the private interest that will be affected by the prejudgment measure; (2) an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and (3) principal attention to the interest of the party seeking the prejudgment remedy, with due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, Pp. 2111-2112.

2. Application of the *Mathews* factors demonstrates that the Connecticut statute, as applied to this case, violates due process by authorizing prejudgment attachment without prior notice and a hearing. Pp. 2112-2116.

(a) The interests affected are significant for a property owner like Doehr, since attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause. That these effects do not amount to a complete, physical, or permanent deprivation of real property is irrelevant, since even the temporary or partial impairments to property rights that such encumbrances entail are sufficient to merit due process protection. See, e.g., ****2108** *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85, 108 S.Ct. 896, 899, 99 L.Ed.2d 75, Pp. 2112-2113.

(b) Without preattachment notice and a hearing, the risk of erroneous deprivation that the State permits here is too great to satisfy due process under any of the interpretations of the statutory "probable cause" requirement offered by the parties. If the statute merely demands inquiry into the sufficiency of the complaint, or, still less, the plaintiff's good-faith belief that the complaint is sufficient, the judge could authorize deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a good-faith standard, even when the complaint failed to state a claim upon which relief could be granted. Even if the *3 provision requires a finding of probable cause to believe that judgment will be rendered in the plaintiff's favor, the reviewing judge in a case like this could make no realistic assessment based on the plaintiff's one-sided, self-serving, and conclusory affidavit and complaint,

particularly since the issue does not concern ordinarily uncomplicated matters like the existence of a debt or delinquent payments that lend themselves to documentary proof. See *Mitchell, supra*, 416 U.S., at 609, 94 S.Ct., at 1901. Moreover, the safeguards that the State does afford—an “expeditious” postattachment notice and an adversary hearing, judicial review of an adverse decision, and a double damages action if the original suit is commenced without probable cause—do not adequately reduce the risk of erroneous deprivation under *Mitchell*, since none of the additional factors that diminished the need for a predeprivation hearing in that case—that the plaintiff had a vendor’s lien to protect, that the likelihood of recovery involved uncomplicated, documentable matters, and that the plaintiff was required to post a bond—is present here. Although a later hearing might negate the presence of probable cause, this would not cure the temporary deprivation that an earlier hearing might have prevented. Pp. 2113-2115.

(c) The interests in favor of an *ex parte* attachment, particularly DiGiovanni’s interests, are too minimal to justify the burdening of Doehr’s ownership rights without a hearing to determine the likelihood of recovery. Although DiGiovanni had no existing interest in Doehr’s real estate when he sought the attachment, and his only interest was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action, there were no allegations that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the suit that would render his property unavailable to satisfy a judgment. Absent such allegations, there was no exigent circumstance permitting the postponement of notice or hearing until after the attachment was effected. Moreover, the State’s substantive interest in protecting DiGiovanni’s *de minimis* rights cannot be any more weighty than those rights themselves, and the State cannot seriously plead additional financial or administrative burdens involving predeprivation hearings when it already claims to provide an immediate post-deprivation hearing. P. 2115.

3. Historical and contemporary practices support the foregoing analysis. Attachment measures in both England and this country have traditionally had several limitations that reduced the risk of erroneous deprivation, including requirements that the defendant had taken or threatened some action that would place satisfaction of the plaintiff’s potential award in jeopardy, that the plaintiff be a creditor, as opposed to the victim of a tort, and that the plaintiff post a bond. Moreover, a survey of current state attachment provisions reveals that nearly every *4 State requires either a preattachment hearing, a **2109 showing of some exigent circumstance, or both,

before permitting an attachment to take place. Although the States for the most part no longer confine attachments to creditor claims, this development only increases the importance of the other limitations. Pp. 2115-2116.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I and III, the opinion of the Court with respect to Part II, in which REHNQUIST, C.J., and MARSHALL, BLACKMUN, STEVENS, O’CONNOR, KENNEDY, and SOUTER, JJ., joined, and an opinion with respect to Parts IV and V, in which MARSHALL, STEVENS, and O’CONNOR, JJ., joined. REHNQUIST, C.J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 2120. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 2123.

Henry S. Cohn, Assistant Attorney General of Connecticut, argued the cause for petitioners. With him on the briefs were *Clarine Nardi Riddle*, Attorney General, *Arnold B. Feigin* and *Carolyn K. Querijero*, Assistant Attorneys General, and *Andrew M. Calamari*.

Joanne S. Faulkner argued the cause for respondent. With her on the brief were *Brian Wolfman* and *Alan B. Morrison*.*

**Allan B. Taylor*, *James J. Tancredi*, and *Kirk D. Tavtigian, Jr.*, filed a brief for the Connecticut Bankers Association et al. as *amici curiae* urging reversal.

Justice WHITE delivered an opinion, Parts I, II, and III of which are the opinion of the Court.^{FN†}

FN† THE CHIEF JUSTICE, Justice BLACKMUN, Justice KENNEDY, and Justice SOUTER join Parts I, II, and III of this opinion, and Justice SCALIA joins Parts I and III.

This case requires us to determine whether a state statute that authorizes prejudgment attachment of real estate without prior notice or hearing, without a showing of extraordinary circumstances, and without a requirement that the person seeking the attachment post a bond, satisfies the Due Process Clause of the Fourteenth Amendment. We hold that, as applied to this case, it does not.

*5 I

On March 15, 1988, petitioner John F. DiGiovanni sub-

mitted an application to the Connecticut Superior Court for an attachment in the amount of \$75,000 on respondent Brian K. Doehr's home in Meriden, Connecticut. DiGiovanni took this step in conjunction with a civil action for assault and battery that he was seeking to institute against Doehr in the same court. The suit did not involve Doehr's real estate, nor did DiGiovanni have any pre-existing interest either in Doehr's home or any of his other property.

Connecticut law authorizes prejudgment attachment of real estate without affording prior notice or the opportunity for a prior hearing to the individual whose property is subject to the attachment. The State's prejudgment remedy statute provides, in relevant part:

“The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claims and (1) that the prejudgment remedy requested is for an attachment of real property....” Conn.Gen.Stat. § 52-278e (1991).^{FN1}

FN1. The complete text of § 52-278e reads:

“Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order. Attachment of real property of municipal officers. (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property; or (2) that there is reasonable likelihood that the defendant (A) neither resides in nor maintains an office or place of business in this state and is not otherwise subject to jurisdiction over his person by the court, or (B) has hidden or will hide himself so that process cannot be served on him or (C) is about to remove himself or his property from this state or (D) is about to fraudulently dispose of or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his creditors or (E) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts

or (F) has stated he is insolvent or has stated he is unable to pay his debts as they mature.

“(b) If a prejudgment remedy is granted pursuant to this section, the plaintiff shall include in the process served on the defendant the following notice prepared by the plaintiff: YOU HAVE RIGHTS SPECIFIED IN THE CONNECTICUT GENERAL STATUTES, INCLUDING CHAPTER 903a, WHICH YOU MAY WISH TO EXERCISE CONCERNING THIS PREJUDGMENT REMEDY. THESE RIGHTS INCLUDE: (1) THE RIGHT TO A HEARING TO OBJECT TO THE PREJUDGMENT REMEDY FOR LACK OF PROBABLE CAUSE TO SUSTAIN THE CLAIM; (2) THE RIGHT TO A HEARING TO REQUEST THAT THE PREJUDGMENT REMEDY BE MODIFIED, VACATED OR DISMISSED OR THAT A BOND BE SUBSTITUTED; AND (3) THE RIGHT TO A HEARING AS TO ANY PORTION OF THE PROPERTY ATTACHED WHICH YOU CLAIM IS EXEMPT FROM EXECUTION.

“(c) The defendant appearing in such action may move to dissolve or modify the prejudgment remedy granted pursuant to this section in which event the court shall proceed to hear and determine such motion expeditiously. If the court determines at such hearing requested by the defendant that there is probable cause to sustain the validity of the plaintiff's claim, then the prejudgment remedy granted shall remain in effect. If the court determines there is no such probable cause, the prejudgment remedy shall be dissolved. An order shall be issued by the court setting forth the action it has taken.”

****2110 *6** The statute does not require the plaintiff to post a bond to insure the payment of damages that the defendant may suffer should the attachment prove wrongfully issued or the claim prove unsuccessful.

As required, DiGiovanni submitted an affidavit in support of his application. In five one-sentence paragraphs, DiGiovanni stated that the facts set forth in his previously submitted complaint were true; that “I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr”; that “[s]aid assault and battery broke my left wrist and further caused an ecchymosis to my right

eye, as well as other injuries”; and that “I have further expended sums of money *7 for medical care and treatment.” App. 24A. The affidavit concluded with the statement, “In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff.” *Ibid.*

On the strength of these submissions the Superior Court Judge, by an order dated March 17, found “probable cause to sustain the validity of the plaintiff’s claim” and ordered the attachment on Doehr’s home “to the value of \$75,000.” The sheriff attached the property four days later, on March 21. Only after this did Doehr receive notice of the attachment. He also had yet to be served with the complaint, which is ordinarily necessary for an action to commence in Connecticut. *Young v. Margiotta*, 136 Conn. 429, 433, 71 A.2d 924, 926 (1950). As the statute further required, the attachment notice informed Doehr that he had the right to a hearing: (1) to claim that no probable cause existed to sustain the claim; (2) to request that the attachment be vacated, modified, or dismissed or that a bond be substituted; or (3) to claim that some portion of the property was exempt from execution. Conn.Gen.Stat. § 52-278e(b) (1991).

Rather than pursue these options, Doehr filed suit against DiGiovanni in Federal District Court, claiming that § 52-278e(a)(1) was unconstitutional under the Due Process Clause of the Fourteenth Amendment.^{FN2} The District Court upheld the statute and granted summary judgment in favor of DiGiovanni. *Pinsky v. Duncan*, 716 F.Supp. 58 (Conn.1989). On appeal, a divided panel of the United States Court of Appeals for the Second Circuit reversed. *Pinsky v. Duncan*, 898 F.2d 852 (1990).^{FN3} Judge Pratt, who wrote the opinion *8 for the court, concluded that the Connecticut statute violated due process in permitting *ex parte* attachment absent a showing of extraordinary circumstances. **2111 “The rule to be derived from *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) and its progeny, therefore, is not that postattachment hearings are generally acceptable provided that plaintiff files a factual affidavit and that a judicial officer supervises the process, but that a prior hearing may be postponed where exceptional circumstances justify such a delay, and where sufficient additional safeguards are present.” *Id.*, at 855. This conclusion was deemed to be consistent with our decision in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), because the absence of a preattachment hearing was approved in that case based on the presence of extraordinary circumstances.

^{FN2}. Three other plaintiffs joined Doehr, challenging § 52-278e(a)(1) out of separate instances of attachment by different defendants. These other plaintiffs and defendants did not participate in the Court of Appeals and are no longer parties in this case.

^{FN3}. The Court of Appeals invited Connecticut to intervene pursuant to 28 U.S.C. § 2403(b) after oral argument. The State elected to intervene in the appeal and has fully participated in the proceedings before this Court.

A further reason to invalidate the statute, the court ruled, was the highly factual nature of the issues in this case. In *Mitchell*, there were “uncomplicated matters that len[t] themselves to documentary proof” and “[t]he nature of the issues at stake minimize[d] the risk that the writ [would] be wrongfully issued by a judge.” *Id.*, at 609-610, 94 S.Ct., at 1901. Similarly, in *Mathews v. Eldridge*, 424 U.S. 319, 343-344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976), where an evidentiary hearing was not required prior to the termination of disability benefits, the determination of disability was “sharply focused and easily documented.” Judge Pratt observed that in contrast the present case involved the fact-specific event of a fist fight and the issue of assault. He doubted that the judge could reliably determine probable cause when presented with only the plaintiff’s version of the altercation. “Because the risk of a wrongful attachment is considerable under these circumstances, we conclude that dispensing with notice and opportunity for a hearing until after the attachment, without a showing of extraordinary circumstances, violates the requirements of due process.” 898 F.2d, at 856. Judge Pratt went on to conclude that in his view, the statute was also constitutionally infirm for its failure*9 to require the plaintiff to post a bond for the protection of the defendant in the event the attachment was ultimately found to have been improvident.

Judge Mahoney was also of the opinion that the statutory provision for attaching real property in civil actions, without a prior hearing and in the absence of extraordinary circumstances, was unconstitutional. He disagreed with Judge Pratt’s opinion that a bond was constitutionally required. Judge Newman dissented from the holding that a hearing prior to attachment was constitutionally required and, like Judge Mahoney, disagreed with Judge Pratt on the necessity for a bond.

The dissent’s conclusion accorded with the views of the

Connecticut Supreme Court, which had previously upheld § 52-278e(b) in *Fermont Division, Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979). We granted certiorari to resolve the conflict of authority. 498 U.S. 809, 111 S.Ct. 42, 112 L.Ed.2d 18 (1990).

II

With this case we return to the question of what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure. Our cases reflect the numerous variations this type of remedy can entail. In *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), the Court struck down a Wisconsin statute that permitted a creditor to effect prejudgment garnishment of wages without notice and prior hearing to the wage earner. In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), the Court likewise found a due process violation in state replevin provisions that permitted vendors to have goods seized through an *ex parte* application to a court clerk and the posting of a bond. Conversely, the Court upheld a Louisiana *ex parte* procedure allowing a lienholder to have disputed goods sequestered in ***2112** *Mitchell v. W.T. Grant Co.*, *supra*. *Mitchell*, however, carefully noted that *Fuentes* was ***10** decided against “a factual and legal background sufficiently different ... that it does not require the invalidation of the Louisiana sequestration statute.” *Id.*, 416 U.S., at 615, 94 S.Ct., at 1904. Those differences included Louisiana’s provision of an immediate postdeprivation hearing along with the option of damages; the requirement that a judge rather than a clerk determine that there is a clear showing of entitlement to the writ; the necessity for a detailed affidavit; and an emphasis on the lienholder’s interest in preventing waste or alienation of the encumbered property. *Id.*, at 615-618, 94 S.Ct., at 1904-1905. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), the Court again invalidated an *ex parte* garnishment statute that not only failed to provide for notice and prior hearing but also failed to require a bond, a detailed affidavit setting out the claim, the determination of a neutral magistrate, or a prompt postdeprivation hearing. *Id.*, at 606-608, 95 S.Ct., at 722-723.

These cases “underscore the truism that ‘[d]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.’” *Mathews v. Eldridge*, *supra*, 424 U.S., at 334, 96 S.Ct., at

902 (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)). In *Mathews*, we drew upon our prejudgment remedy decisions to determine what process is due when the government itself seeks to effect a deprivation on its own initiative. 424 U.S., at 334, 96 S.Ct., at 902. That analysis resulted in the now familiar threefold inquiry requiring consideration of “the private interest that will be affected by the official action”; “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards”; and lastly “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.*, at 335, 96 S.Ct., at 903.

[1] Here the inquiry is similar, but the focus is different. Prejudgment remedy statutes ordinarily apply to disputes between private parties rather than between an individual and ***11** the government. Such enactments are designed to enable one of the parties to “make use of state procedures with the overt, significant assistance of state officials,” and they undoubtedly involve state action “substantial enough to implicate the Due Process Clause.” *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988). Nonetheless, any burden that increasing procedural safeguards entails primarily affects not the government, but the party seeking control of the other’s property. See *Fuentes v. Shevin*, *supra*, 407 U.S., at 99-101, 92 S.Ct., at 2003-2005 (WHITE, J., dissenting). For this type of case, therefore, the relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

We now consider the *Mathews* factors in determining the adequacy of the procedures before us, first with regard to the safeguards of notice and a prior hearing, and then in relation to the protection of a bond.

III

[2] We agree with the Court of Appeals that the property

interests that attachment ****2113** affects are significant. For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause. Nor does Connecticut deny that any of these consequences occurs.

*12 [3][4] Instead, the State correctly points out that these effects do not amount to a complete, physical, or permanent deprivation of real property; their impact is less than the perhaps temporary total deprivation of household goods or wages. See *Sniadach*, *supra*, 395 U.S., at 340, 89 S.Ct., at 1822; *Mitchell*, 416 U.S., at 613, 94 S.Ct., at 1903. But the Court has never held that only such extreme deprivations trigger due process concern. See *Buchanan v. Warley*, 245 U.S. 60, 74, 38 S.Ct. 16, 18, 62 L.Ed. 149 (1917). To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, “are subject to the strictures of due process.” *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85, 108 S.Ct. 896, 899, 99 L.Ed.2d 75 (1988) (citing *Mitchell*, *supra*, 416 U.S., at 604, 94 S.Ct., at 1898; *Hodge v. Muscatine County*, 196 U.S. 276, 281, 25 S.Ct. 237, 239, 49 L.Ed. 477 (1905)).^{FN4}

FN4. Our summary affirmance in *Spielman-Fond, Inc. v. Hanson's, Inc.*, 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974), does not control. In *Spielman-Fond*, the District Court held that the filing of a mechanic's lien did not amount to the taking of a significant property interest. 379 F.Supp. 997, 999 (Ariz.1973) (three-judge court) (*per curiam*). A summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion. *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974). The facts of *Spielman-Fond* presented an alternative basis for affirmance in any event. Unlike the case before us, the mechanic's lien statute in *Spielman-Fond* required the creditor to have a pre-existing interest in the property at issue. 379 F.Supp., at 997. As we explain below, a heightened plaintiff interest in certain circumstances can provide a ground for upholding procedures that are otherwise suspect. *Infra*, at 2115.

[5] We also agree with the Court of Appeals that the risk of erroneous deprivation that the State permits here is substantial. By definition, attachment statutes premise a deprivation of property on one ultimate factual contingency—the award of damages to the plaintiff which the defendant may not be able to satisfy. See *Ownbey v. Morgan*, 256 U.S. 94, 104-105, 41 S.Ct. 433, 435-436, 65 L.Ed. 837 (1921); R. Thompson & J. Seibert, *Remedies: Damages, Equity and Restitution* § 5.01 (1983). For attachments *13 before judgment, Connecticut mandates that this determination be made by means of a procedural inquiry that asks whether “there is probable cause to sustain the validity of the plaintiff's claim.” *Conn.Gen.Stat. § 52-278e(a)* (1991). The statute elsewhere defines the validity of the claim in terms of the likelihood “that judgment will be rendered in the matter in favor of the plaintiff.” *Conn.Gen.Stat. § 52-278c(a)(2)* (1991); *Ledgebrook Condominium Assn. v. Lusk Corp.*, 172 Conn. 577, 584, 376 A.2d 60, 63-64 (1977). What probable cause means in this context, however, remains obscure. The State initially took the position, as did the dissent below, that the statute requires a plaintiff to show the objective likelihood of the suit's success. Brief for Petitioners 12; *Pinsky*, 898 F.2d, at 861-862 (Newman, J., dissenting). Doehr, citing ambiguous state cases, reads the provision as requiring no more than that a plaintiff demonstrate a subjective good-faith belief that the suit will succeed. Brief for Respondent 25-26. *Ledgebrook Condominium Assn.*, *supra*, 172 Conn., at 584, 376 A.2d, at 63-64; *Anderson v. Nedovich*, 19 Conn.App. 85, 88, 561 A.2d 948, 949 (1989). At oral argument, the State shifted its position to argue that the statute requires something akin to the plaintiff stating a claim with sufficient facts to survive a motion to dismiss.

****2114** We need not resolve this confusion since the statute presents too great a risk of erroneous deprivation under any of these interpretations. If the statute demands inquiry into the sufficiency of the complaint, or, still less, the plaintiff's good-faith belief that the complaint is sufficient, requirement of a complaint and a factual affidavit would permit a court to make these minimal determinations. But neither inquiry adequately reduces the risk of erroneous deprivation. Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations *14 that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere

good-faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident and too great to satisfy the requirements of due process absent any countervailing consideration.

Even if the provision requires the plaintiff to demonstrate, and the judge to find, probable cause to believe that judgment will be rendered in favor of the plaintiff, the risk of error was substantial in this case. As the record shows, and as the State concedes, only a skeletal affidavit need be, and was, filed. The State urges that the reviewing judge normally reviews the complaint as well, but concedes that the complaint may also be conclusory. It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions. And as the Court of Appeals said, in a case like this involving an alleged assault, even a detailed affidavit would give only the plaintiff's version of the confrontation. Unlike determining the existence of a debt or delinquent payments, the issue does not concern "ordinarily uncomplicated matters that lend themselves to documentary proof." *Mitchell*, 416 U.S., at 609, 94 S.Ct., at 1901. The likelihood of error that results illustrates that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647-649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

[6] What safeguards the State does afford do not adequately reduce this risk. Connecticut points out that the statute also provides an "expeditious [s]" postattachment adversary hearing,*15 § 52-278e(c); ^{FNS} notice for such a hearing, § 52-278e(b); judicial review of an adverse decision, § 52-278l (a); and a double damages action if the original suit is commenced without probable cause, § 52-568(a)(1). Similar considerations were present in *Mitchell*, where we upheld Louisiana's**2115 sequestration statute despite the lack of predeprivation notice and hearing. But in *Mitchell*, the plaintiff had a vendor's lien to protect, the risk of error was minimal because the likelihood of recovery involved uncomplicated matters that lent themselves to documentary proof, 416 U.S., at 609-610, 94 S.Ct., at 1901, and the plaintiff was required to put up a bond. None of these factors diminishing the need for a predeprivation hearing is present in this case. It is true that a later hearing might negate the presence of probable

cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented. "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." *Fuentes*, 407 U.S., at 86, 92 S.Ct., at 1997.

FN5. The parties vigorously dispute whether a defendant can in fact receive a prompt hearing. Doeher contends that the State's rules of practice prevent the filing of any motion-including a motion for the mandated postattachment hearing-until the return date on the complaint, which in this case was 30 days after service. Connecticut Practice Book § 114 (1988). Under state law at least 12 days must elapse between service on the defendant and the return date. *Conn.Gen.Stat. § 52-46* (1991). The State counters that the postattachment hearing is available upon request. See *Vermont Division, Dynamics Corp. of America v. Smith*, 178 Conn. 393, 397-398, 423 A.2d 80, 83 (1979) ("Most important, the statute affords to the defendant whose property has been attached the opportunity to obtain an immediate postseizure hearing at which the prejudgment remedy will be dissolved unless the moving party proves probable cause to sustain the validity of his claim"). We assume, without deciding, that the hearing is prompt. Even on this assumption, the State's procedures fail to provide adequate safeguards against the erroneous deprivation of the property interest at stake.

*16 [7] Finally, we conclude that the interests in favor of an *ex parte* attachment, particularly the interests of the plaintiff, are too minimal to supply such a consideration here. The plaintiff had no existing interest in Doeher's real estate when he sought the attachment. His only interest in attaching the property was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action. Yet there was no allegation that Doeher was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. Our cases have recognized such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected. See *Mitchell*, *supra*, 416 U.S., at 609, 94 S.Ct., at 1901; *Fuentes*, *supra*, 407 U.S., at 90-92, 92 S.Ct., at 1999-2000; *Sniadach*, 395 U.S., at 339, 89 S.Ct., at 1821. Absent such

allegations, however, the plaintiff's interest in attaching the property does not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery.

[8] No interest the government may have affects the analysis. The State's substantive interest in protecting any rights of the plaintiff cannot be any more weighty than those rights themselves. Here the plaintiff's interest is *de minimis*. Moreover, the State cannot seriously plead additional financial or administrative burdens involving pre-deprivation hearings when it already claims to provide an immediate post-deprivation hearing. Conn.Gen.Stat. §§ 52-278e(b) and (c) (1991); Fermont, 178 Conn., at 397-398, 423 A.2d, at 83.

[9][10] Historical and contemporary practices support our analysis. Prejudgment attachment is a remedy unknown at common law. Instead, "it traces its origin to the Custom of London, under which a creditor might attach money or goods of the defendant either in the plaintiff's own hands or in the custody of a third person, by proceedings in the mayor's court or in the sheriff's court." Ownbey, 256 U.S., at 104, 41 S.Ct., at 435. Generally speaking, attachment measures in both England and this *17 country had several limitations that reduced the risk of erroneous deprivation which Connecticut permits. Although attachments ordinarily did not require prior notice or a hearing, they were usually authorized only where the defendant had taken or threatened to take some action that would place the satisfaction of the plaintiff's potential award in jeopardy. See C. Drake, Law of Suits by Attachment, §§ 40-82 (1866) (hereinafter Drake); 1 R. Shinn, Attachment and Garnishment § 86 (1896) (hereinafter Shinn). Attachments, moreover, were generally confined to claims by creditors. Drake §§ 9-10; Shinn § 12. As we and the Court of Appeals have noted, disputes between debtors and creditors more readily lend themselves to accurate *ex parte* assessments of the merits. Tort actions, like the assault and battery claim at issue here, do not. See Mitchell, supra, 416 U.S., at 609-610, 94 S.Ct., at 1901. Finally, as we will discuss below, attachment statutes historically**2116 required that the plaintiff post a bond. Drake §§ 114-183; Shinn § 153.

Connecticut's statute appears even more suspect in light of current practice. A survey of state attachment provisions reveals that nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place. See Appendix to this opinion. Twenty-seven States,

as well as the District of Columbia, permit attachments only when some extraordinary circumstance is present. In such cases, preattachment hearings are not required but postattachment hearings are provided. Ten States permit attachment without the presence of such factors but require prewrit hearings unless one of those factors is shown. Six States limit attachments to extraordinary circumstance cases, but the writ will not issue prior to a hearing unless there is a showing of some even more compelling condition.^{FN6} Three States always require a *18 preattachment hearing. Only Washington, Connecticut, and Rhode Island authorize attachments without a prior hearing in situations that do not involve any purportedly heightened threat to the plaintiff's interests. Even those States permit *ex parte* deprivations only in certain types of cases: Rhode Island does so only when the claim is equitable; Connecticut and Washington do so only when real estate is to be attached, and even Washington requires a bond. Conversely, the States for the most part no longer confine attachments to creditor claims. This development, however, only increases the importance of the other limitations.

^{FN6}. One State, Pennsylvania, has not had an attachment statute or rule since the decision in Jonnet v. Dollar Savings Bank of New York City, 530 F.2d 1123 (CA3 1976).

[11] We do not mean to imply that any given exigency requirement protects an attachment from constitutional attack. Nor do we suggest that the statutory measures we have surveyed are necessarily free of due process problems or other constitutional infirmities in general. We do believe, however, that the procedures of almost all the States confirm our view that the Connecticut provision before us, by failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstance, clearly falls short of the demands of due process.

IV

A

Although a majority of the Court does not reach the issue, Justices MARSHALL, STEVENS, O'CONNOR, and I deem it appropriate to consider whether due process also requires the plaintiff to post a bond or other security in addition to requiring a hearing or showing of some exigency.^{FN7}

^{FN7}. Ordinarily we will not address a contention advanced by a respondent that would enlarge his

or her rights under a judgment, without the respondent filing a cross-petition for certiorari. *E.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119, n. 14, 105 S.Ct. 613, 620, n. 14, 83 L.Ed.2d 523 (1985). Here the Court of Appeals rejected Doehr's argument that § 52-278e(a)(1) violates due process in failing to mandate a preattachment bond. Nonetheless, this case involves considerations that in the past have prompted us "to consider the question highlighted by respondent." *Berkemer v. McCarty*, 468 U.S. 420, 435-436, n. 23, 104 S.Ct. 3138, 3148, n. 23, 82 L.Ed.2d 317 (1984). First, as our cases have shown, the notice and hearing question and the bond question are intertwined and can fairly be considered facets of the same general issue. Thus, "[w]ithout undue strain, the position taken by respondent before this Court ... might be characterized as an argument in support of the judgment below" insofar as a discussion of notice and a hearing cannot be divorced from consideration of a bond. *Ibid.* Second, this aspect of prejudgment attachment "plainly warrants our attention, and with regard to which the lower courts are in need of guidance." *Ibid.* Third, "and perhaps most importantly, both parties have briefed and argued the question." *Ibid.*

*19 As noted, the impairments to property rights that attachments effect merit due process protection. Several consequences can be severe, such as the default of a homeowner's mortgage. In the present context, it **2117 need only be added that we have repeatedly recognized the utility of a bond in protecting property rights affected by the mistaken award of prejudgment remedies. *Di-Chem*, 419 U.S., at 610, 611, 95 S.Ct., at 724, 725 (Powell, J., concurring in judgment); *id.*, at 619, 95 S.Ct., at 728 (BLACKMUN, J., dissenting); *Mitchell*, 416 U.S., at 606, n. 8, 94 S.Ct., at 1899, n. 8.

Without a bond, at the time of attachment, the danger that these property rights may be wrongfully deprived remains unacceptably high even with such safeguards as a hearing or exigency requirement. The need for a bond is especially apparent where extraordinary circumstances justify an attachment with no more than the plaintiff's *ex parte* assertion of a claim. We have already discussed how due process tolerates, and the States generally permit, the otherwise impermissible chance of erroneously depriving the defendant in such situations in light of the heightened interest of the plaintiff. Until a postattachment hearing,

however, a defendant has no protection against damages sustained where no extraordinary circumstance in fact existed or the plaintiff's likelihood of recovery was nil. Such protection is what a bond can supply. Both the Court and its individual Members have repeatedly found the requirement of a bond to play an essential role in reducing what would have been too great a degree of risk in precisely this type of circumstance. *20*Mitchell*, *supra*, at 610, 619, 94 S.Ct., at 1901, 1906; *Di-Chem*, 419 U.S., at 613, 95 S.Ct., at 725 (Powell, J., concurring in judgment); *id.*, at 619, 95 S.Ct., at 728 (BLACKMUN, J., dissenting); *Fuentes*, 407 U.S., at 101, 92 S.Ct., at 2005 (WHITE, J., dissenting).

But the need for a bond does not end here. A defendant's property rights remain at undue risk even when there has been an adversarial hearing to determine the plaintiff's likelihood of recovery. At best, a court's initial assessment of each party's case cannot produce more than an educated prediction as to who will win. This is especially true when, as here, the nature of the claim makes any accurate prediction elusive. See *Mitchell*, *supra*, 416 U.S., at 609-610, 94 S.Ct., at 1901. In consequence, even a full hearing under a proper probable-cause standard would not prevent many defendants from having title to their homes impaired during the pendency of suits that never result in the contingency that ultimately justifies such impairment, namely, an award to the plaintiff. Attachment measures currently on the books reflect this concern. All but a handful of States require a plaintiff's bond despite also affording a hearing either before, or (for the vast majority, only under extraordinary circumstances) soon after, an attachment takes place. See Appendix to this opinion. Bonds have been a similarly common feature of other prejudgment remedy procedures that we have considered, whether or not these procedures also included a hearing. See *Ownbey*, 256 U.S., at 101-102, n. 1, 41 S.Ct., at 435, n. 1; *Fuentes*, *supra*, 407 U.S., at 73, n. 6, 75-76, n. 7, 81-82, 92 S.Ct., at 1990, n. 6, 1991-1992, n. 7, 1994-1995; *Mitchell*, *supra*, 416 U.S., at 606, and n. 6, 94 S.Ct., at 1899; *Di-Chem*, *supra*, 419 U.S., at 602-603, n. 1, 608, 95 S.Ct., at 721, n. 1, 723.

The State stresses its double damages remedy for suits that are commenced without probable cause. Conn.Gen.Stat. § 52-568(a)(1).^{FN8} This remedy, however, fails to make *21 up for the lack of a bond. As an initial matter, the meaning of "probable cause" in this provision is no more clear here than it was in the attachment provision itself. Should the term mean the plaintiff's good faith or the facial adequacy of the complaint, **2118 the remedy is clearly insufficient.

A defendant who was deprived where there was little or no likelihood that the plaintiff would obtain a judgment could nonetheless recover only by proving some type of fraud or malice or by showing that the plaintiff had failed to state a claim. Problems persist even if the plaintiff's ultimate failure permits recovery. At best a defendant must await a decision on the merits of the plaintiff's complaint, even assuming that a § 52-568(a)(1) action may be brought as a counterclaim. *Hydro Air of Connecticut, Inc. v. Versa Technologies, Inc.*, 99 F.R.D. 111, 113 (Conn.1983). Settlement, under Connecticut law, precludes seeking the damages remedy, a fact that encourages the use of attachments as a tactical device to pressure an opponent to capitulate. *Blake v. Levy*, 191 Conn. 257, 464 A.2d 52 (1983). An attorney's advice that there is probable cause to commence an action constitutes a complete defense, even if the advice was unsound or erroneous. *Vandersluis v. Weil*, 176 Conn. 353, 361, 407 A.2d 982, 987 (1978). Finally, there is no guarantee that the original plaintiff will have adequate assets to satisfy an award that the defendant may win.

FN8. Section 52-568(a)(1) provides:

“Any person who commences and prosecutes any civil action or complaint against another, in his own name, or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages.”

Nor is there any appreciable interest against a bond requirement. Section 52-278e(a)(1) does not require a plaintiff to show exigent circumstances nor any pre-existing interest in the property facing attachment. A party must show more than the mere existence of a claim before subjecting an opponent to prejudgment proceedings that carry a significant risk of erroneous deprivation. See *Mitchell, supra*, 416 U.S., at 604-609, 94 S.Ct., at 1901; *Fuentes, supra*, 407 U.S., at 90-92, 92 S.Ct., at 1999-2000; *Sniadach*, 395 U.S., at 339, 89 S.Ct., at 1821.

*22 B

Our foregoing discussion compels the four of us to consider whether a bond excuses the need for a hearing or other safeguards altogether. If a bond is needed to augment

the protections afforded by preattachment and postattachment hearings, it arguably follows that a bond renders these safeguards unnecessary. That conclusion is unconvincing, however, for it ignores certain harms that bonds could not undo but that hearings would prevent. The law concerning attachments has rarely, if ever, required defendants to suffer an encumbered title until the case is concluded without any prior opportunity to show that the attachment was unwarranted. Our cases have repeatedly emphasized the importance of providing a prompt postdeprivation hearing at the very least. *Mitchell*, 416 U.S., at 606, 94 S.Ct., at 1899; *Di-Chem*, 419 U.S., at 606-607, 95 S.Ct., at 722-723. Every State but one, moreover, expressly requires a preattachment or postattachment hearing to determine the propriety of an attachment.

The necessity for at least a prompt postattachment hearing is self-evident because the right to be compensated at the end of the case, if the plaintiff loses, for all provable injuries caused by the attachment is inadequate to redress the harm inflicted, harm that could have been avoided had an early hearing been held. An individual with an immediate need or opportunity to sell a property can neither do so, nor otherwise satisfy that need or recreate the opportunity. The same applies to a parent in need of a home equity loan for a child's education, an entrepreneur seeking to start a business on the strength of an otherwise strong credit rating, or simply a homeowner who might face the disruption of having a mortgage placed in technical default. The extent of these harms, moreover, grows with the length of the suit. Here, oral argument indicated that civil suits in Connecticut commonly take up to four to seven years for completion. Tr. of Oral Arg. 44. Many state attachment statutes require *23 that the amount of a bond be anywhere from the equivalent to twice the amount the plaintiff seeks. See, e.g., *Utah Rule of Civ.Proc. 64C(b)*. These amounts bear no relation to the harm the defendant might suffer even assuming that money damages can make up for the foregoing disruptions. It **2119 should be clear, however, that such an assumption is fundamentally flawed. Reliance on a bond does not sufficiently account for the harms that flow from an erroneous attachment to excuse a State from reducing that risk by means of a timely hearing.

If a bond cannot serve to dispense with a hearing immediately after attachment, neither is it sufficient basis for not providing a preattachment hearing in the absence of exigent circumstances even if in any event a hearing would be provided a few days later. The reasons are the same: a wrongful attachment can inflict injury that will not fully be redressed by recovery on the bond after a prompt postat-

tachment hearing determines that the attachment was invalid.

Once more, history and contemporary practices support our conclusion. Historically, attachments would not issue without a showing of extraordinary circumstances even though a plaintiff bond was almost invariably required in addition. Drake §§ 4, 114; Shinn §§ 86, 153. Likewise, all but eight States currently require the posting of a bond. Out of this 42-State majority, all but one requires a preattachment hearing, a showing of some exigency, or both, and all but one expressly require a postattachment hearing when an attachment has been issued *ex parte*. See Appendix to this opinion. This testimony underscores the point that neither a hearing nor an extraordinary circumstance limitation eliminates the need for a bond, no more than a bond

allows waiver of these other protections. To reconcile the interests of the defendant and the plaintiff accurately, due process generally requires all of the above.

*24 V

Because Connecticut's prejudgment remedy provision, Conn.Gen.Stat. § 52-278e(a)(1), violates the requirements of due process by authorizing prejudgment attachment without prior notice or a hearing, the judgment of the Court of Appeals is affirmed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

Prejudgment Attachment Statutes

	<i>Preattach. Hrg. Re- quired Unless Exigent Circs.</i>	<i>Attachment Only in Exigent Circs.; No Preattach. Hrg. Required</i>	<i>Preattach. Hrg. Even in Most Ex- igent Circs.</i>	<i>Bond Required</i>	<i>Postattach. Hrg. Required</i>
Alabama		X		X	X
Alaska		Preattachment hrg. always required.		X	
Arizona	X			X	X
Arkansas		X		X	X
California	X			X	X
Colorado		X		X	X
Connecticut		X(or unless attachment of real estate)			X
Delaware		X		X	X
DC		X		X	X
Florida		X		X	X
Georgia		X		X	X
Hawaii		Preattachment hrg. always required.		X	X
Idaho	X			X	X
Illinois		X		X	X
Indiana		X		X	X
Iowa		X		X	X
Kansas		X		X	X

	<i>Preattach. Hrg. Re- quired Unless Exigent Circs.</i>	<i>Attachment Only in Exigent Circs.; No Preattach. Hrg. Required</i>	<i>Preattach. Hrg. Even in Most Ex- igent Circs.</i>	<i>Bond Required</i>	<i>Postattach. Hrg. Required</i>
Kentucky			X	X	
Louisiana		X		X	X
Maine	X				X
Maryland		X		X	X
Massachusetts	X			X/O ¹	X
Michigan		X			X
Minnesota			X	X	X
Mississippi		X		X	X
Missouri		X		X	X
Montana		X		X	X
Nebraska		X		X	X
Nevada	X			X	X
New Hampshire	X				X
New Jersey	X			X/O	X
New Mexico		X		X	X
New York		X		X	X
North Carolina		X		X	X
North Dakota		X		X	X
Ohio			X	X	X
Oklahoma	X			X	X
Oregon		Preattachment hrg. always required.		X	
Pennsylvania		Rescinded in light of 530 F.2d 1123 (CA3 1976).			
Rhode Island		X (but not if equitable claim)		X/O	
South Carolina		X		X	X
South Dakota		X		X	X
Tennessee		X		X	X ²
Texas			X	X	X
Utah			X	X	X
Vermont	X				X
Virginia		X		X	X
Washington			X	X ³	X

(except for real estate on a contract claim)

West Virginia	X	X	X
Wisconsin	X	X	X
Wyoming		X	X

FN1 An "x/o" in the "Bond Required" column indicates that a bond may be required at the discretion of the court.

FN2 The court may, under certain circumstances, quash the attachment at the defendant's request without a hearing.

FN3 A bond is required except in situations in which the plaintiff seeks to attach the real property of a defendant who, after diligent efforts, cannot be served.

**2120 *26 *l* Chief Justice REHNQUIST, with whom Justice BLACKMUN joins, concurring in part and concurring in the judgment.

I agree with the Court that the Connecticut attachment statute, "as applied to this case," *ante*, at 2109, fails to satisfy the Due Process Clause of the Fourteenth Amendment. I therefore join Parts I, II, and III of its opinion. Unfortunately, the remainder of the opinion does not confine itself to the facts of this case, but enters upon a lengthy disquisition as to what combination of safeguards are required to satisfy due process in hypothetical cases not before the Court. I therefore do not join Part IV.

As the Court's opinion points out, the Connecticut statute allows attachment not merely**2121 for a creditor's claim, but for a tort claim of assault and battery; it affords no opportunity for a predeprivation hearing; it contains no requirement that there be "exigent circumstances," such as an effort on the part of the defendant to conceal assets; no bond is required from the plaintiff; and the property attached is one in which the plaintiff has no pre-existing interest. The Court's opinion*27 is, in my view, ultimately correct when it bases its holding of unconstitutionality of the Connecticut statute as applied here on our cases of *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). But I do not believe that the result follows so inexorably as the Court's opinion suggests. All of the cited cases dealt with personalty-bank deposits or chattels-and each involved the physical seizure of the property itself, so that the defendant was deprived of its use. These cases, which represented something of a revolution in the jurisprudence of procedural due process, placed substantial

limits on the methods by which creditors could obtain a lien on the assets of a debtor prior to judgment. But in all of them the debtor was deprived of the use and possession of the property. In the present case, on the other hand, Connecticut's prejudgment attachment on real property statute, which secures an incipient lien for the plaintiff, does not deprive the defendant of the use or possession of the property.

The Court's opinion therefore breaks new ground, and I would point out, more emphatically than the Court does, the limits of today's holding. In *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F.Supp. 997, 999 (Ariz.1973), the District Court held that the filing of a mechanics' lien did not cause the deprivation of a significant property interest of the owner. We summarily affirmed that decision. 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974). Other courts have read this summary affirmance to mean that the mere imposition of a lien on real property, which does not disturb the owner's use or enjoyment of the property, is not a deprivation of property calling for procedural due process safeguards. I agree with the Court, however, that upon analysis the deprivation here is a significant one, even though the owner remains in undisturbed possession. "For a property owner like Doebr, attachment ordinarily clouds title; impairs the ability to sell or otherwise *28 alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Ante*, at 2113. Given the elaborate system of title records relating to real property which prevails in all of our States, a lienor need not obtain possession or use of real property belonging to a debtor in order to significantly impair its value to him.

But in *Spielman-Fond, Inc., supra*, there was, as the Court points out, *ante*, at 2113, n. 4, an alternative basis available

to this Court for affirmance of that decision. Arizona recognized a pre-existing lien in favor of unpaid mechanics and materialmen who had contributed labor or supplies which were incorporated in improvements to real property. The existence of such a lien upon the very property ultimately posted or noticed distinguishes those cases from the present one, where the plaintiff had no pre-existing interest in the real property which he sought to attach. Materialman's and mechanic's lien statutes award an interest in real property to workers who have contributed their labor, and to suppliers who have furnished material, for the improvement of the real property. Since neither the labor nor the material can be reclaimed once it has become a part of the realty, this is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy against a property**2122 owner who has defaulted on his promise to pay for the labor and the materials. To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes.

Petitioners in their brief rely in part on our summary affirmance in Bartlett v. Williams, 464 U.S. 801, 104 S.Ct. 46, 78 L.Ed.2d 67 (1983). That case involved a *lis pendens*, in which the question presented to this Court was whether such a procedure could be valid when the only protection afforded to the owner of land affected by the *lis pendens* was a postsequestration hearing. *29 A notice of *lis pendens* is a well-established, traditional remedy whereby a plaintiff (usually a judgment creditor) who brings an action to enforce an interest in property to which the defendant has title gives notice of the pendency of such action to third parties; the notice causes the interest which he establishes, if successful, to relate back to the date of the filing of the *lis pendens*. The filing of such notice will have an effect upon the defendant's ability to alienate the property, or to obtain additional security on the basis of title to the property, but the effect of the *lis pendens* is simply to give notice to the world of the remedy being sought in the lawsuit itself. The *lis pendens* itself creates no additional right in the property on the part of the plaintiff, but simply allows third parties to know that a lawsuit is pending in which the plaintiff is seeking to establish such a right. Here, too, the fact that the plaintiff already claims an interest in the property which he seeks to enforce by a lawsuit distinguishes this class of cases from the Connecticut attachment employed in the present case.

Today's holding is a significant development in the law; the only cases dealing with real property cited in the

Court's opinion, Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 85, 108 S.Ct. 896, 899, 99 L.Ed.2d 75 (1988), and Hodge v. Muscatine County, 196 U.S. 276, 281, 25 S.Ct. 237, 239, 49 L.Ed. 477 (1905), arose out of lien foreclosure sales in which the question was whether the owner was entitled to proper notice. The change is dramatically reflected when we compare today's decision with the almost casual statement of Justice Holmes, writing for a unanimous Court in Coffin Brothers & Co. v. Bennett, 277 U.S. 29, 31, 48 S.Ct. 422, 423, 72 L.Ed. 768 (1928):

“[N]othing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit.”

The only protection accorded to the debtor in that case was the right to contest his liability in a postdeprivation proceeding.

*30 It is both unwise and unnecessary, I believe, for the plurality to proceed, as it does in Part IV, from its decision of the case before it to discuss abstract and hypothetical situations not before it. This is especially so where we are dealing with the Due Process Clause which, as the Court recognizes, “ ‘ “unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,” ’ ” *ante*, at 2112. And it is even more true in a case involving constitutional limits on the methods by which the States may transfer or create interests in real property; in other areas of the law, dicta may do little damage, but those who insure titles or write title opinions often do not enjoy the luxury of distinguishing between dicta and holding.

The two elements of due process with which the Court concerns itself in Part IV—the requirements of a bond and of “exigent circumstances”—prove to be upon analysis so vague that the discussion is not only unnecessary, but not particularly useful. Unless one knows what the terms and conditions of a bond are to be, the requirement of a “bond” in the abstract means little. The amount to be secured by the bond and the conditions of the bond are left unaddressed—is there to be liability on the part of a plaintiff if he is ultimately unsuccessful in the underlying lawsuit, or is it instead to be conditioned on **2123 some sort of good-faith test? The “exigent circumstances” referred to by the Court are admittedly equally vague; nonresidency appears to be enough in some States, an attempt to conceal assets is required in others, an effort to flee the jurisdiction in still others. We should await concrete cases which

111 S.Ct. 2105
501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1, 59 USLW 4587
(Cite as: 501 U.S. 1, 111 S.Ct. 2105)

present questions involving bonds and exigent circumstances before we attempt to decide when and if the Due Process Clause of the Fourteenth Amendment requires them as prerequisites for a lawful attachment.

Justice SCALIA, concurring in part and concurring in the judgment.

Since the manner of attachment here was not a recognized procedure at common law, cf. *31 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24, 111 S.Ct. 1032, 1046, 113 L.Ed.2d 1 (1991) (SCALIA, J., concurring in judgment), I agree that its validity under the Due Process Clause should be determined by applying the test we set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); and I agree that it fails that test. I join Parts I and III of the Court's opinion, and concur in the judgment of the Court.

U.S.Conn.,1991.
Connecticut v. Doehr
501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1, 59 USLW 4587

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C

Supreme Court of Wisconsin.
 ROSELIEP
 v.
 HERRO ET AL.
 Dec. 8, 1931.

Appeal from a judgment of the Circuit Court for Milwaukee County, entered on the 7th day of March, 1931, dismissing the cross-complaint of the defendant Heating & Plumbing Finance Corporation; John J. Gregory, Circuit Judge.

Action by Charles H. Roseliep against Charles H. Herro and Nellie (sometimes spelled Nelley) Herro, Heating & Plumbing Finance Corporation, and others, with cross-complaints against the two first named defendants. From the judgment, defendant last named appeals.--[By Editorial Staff.]

Reversed with directions.

West Headnotes

Action 13 ⚡3513 Action13II Nature and Form13k33 Statutory Remedies

13k35 k. Cumulative or Exclusive Remedies. Most Cited Cases

The lien statutes of Wisconsin provide new or additional remedies supplementary to the common law remedies and such laws are to be liberally construed for the purpose of aiding materialmen and laborers to obtain compensation for materials used and services bestowed upon the property of another enhancing its value.

Appeal and Error 30 ⚡16930 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court30k169 k. Necessity of Presentation inGeneral. Most Cited Cases

Appellate court generally refuses to consider questions which were not properly or in timely manner presented for determination by trial court.

Appeal and Error 30 ⚡16930 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court30k169 k. Necessity of Presentation inGeneral. Most Cited Cases

Appellate court will not generally decide question involving factual elements not raised by pleadings or brought to attention of lower court.

Appeal and Error 30 ⚡173(9)30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court30k173 Grounds of Defense or Opposition30k173(9) k. Ratification, Estoppel,Waiver, and Res Judicata. Most Cited Cases

Question respecting intention of parties to waive right to lien, not raised in lower court, will not be determined on appeal.

Election of Remedies 143 ⚡3(1)143 Election of Remedies143k3 Inconsistency of Alternative Remedies143k3(1) k. In General. Most Cited Cases

Entry of judgment on note given for labor and materials held not election to pursue inconsistent remedy so as to prevent foreclosure of lien. St.1929, § 289.05 (W.S.A.).

Mechanics' Liens 257 ⚡94257 Mechanics' Liens257II Right to Lien257II(E) Subcontractors, and Contractors'

Workers and Materialmen

257k94 k. Grounds and Requisites of Lien

in General. Most Cited Cases
Lien statutes are to be liberally construed for purpose of aiding materialmen and laborers to obtain compensation for materials and services.

Mechanics' Liens 257 ↪ 209

257 Mechanics' Liens
257VI Waiver of Right to Lien
257k209 k. Implied Waiver in General. Most Cited Cases
Conduct of parties inconsistent with right to file lien, in order to constitute waiver, must manifest intention to waive right.

Mechanics' Liens 257 ↪ 211(1)

257 Mechanics' Liens
257VI Waiver of Right to Lien
257k211 Taking or Transfer of Bill or Note
257k211(1) k. In General. Most Cited Cases
Mere giving of note or other evidence of indebtedness does not in itself amount to waiver of lien for labor or materials. St.1929, § 289.05 (W.S.A.).

Mechanics' Liens 257 ↪ 214

257 Mechanics' Liens
257VI Waiver of Right to Lien
257k214 k. Recovery of Judgment for Debt. Most Cited Cases
Entry of judgment on note given for materials and labor held not to result in waiver or release of lien. St.1929, § 289.05 (W.S.A.).

Mechanics' Liens 257 ↪ 246

257 Mechanics' Liens
257XI Enforcement
257k246 k. Exclusiveness of Statutory Remedy. Most Cited Cases
Generally, lien claimant may bring personal action against owner for debt as cumulative remedy without waiving right to lien.

Mechanics' Liens 257 ↪ 288(1)

257 Mechanics' Liens
257XI Enforcement

257k286 Trial or Hearing
257k288 Questions for Jury
257k288(1) k. In General. Most Cited Cases

Intention of parties in respect to waiver of right to lien is question of fact to be determined by trial court.

This action was commenced by the plaintiff to foreclose a certain mortgage theretofore given to him by the defendants Charles H. Herro and Nellie Herro. Several of the other defendants were owners of mechanics' liens duly filed at the time of the commencement of this action. These defendants cross-complained against the defendants Herro and asked for the foreclosure of their respective liens. One A. F. Leitgabel was a heating contractor who, pursuant to a written contract, had furnished materials and performed labor for installing a heating system in the building owned by the defendants Herro. The work was performed on and between the 17th day of September and the 13th day of November, 1928. On or about the 8th day of November, 1928, the Herros made and delivered to Leitgabel their promissory note in the amount of \$3,836, payable in thirty-six equal monthly installments. The note included the amount due on the heating contract and also certain financing charges. The note contained a provision accelerating its due date in case of default in making any installment payment, and also provided for 15 per cent. attorney's fees, if allowed by law, in case it was placed in the hands of an attorney at law for collection. Thereafter a claim for lien was duly filed by Leitgabel. Both the note and the claim for lien were subsequently assigned to the finance corporation. Several installment payments were made before the Herros defaulted. Thereafter action was commenced by the finance corporation against the Herros on the promissory note, and judgment by default was duly entered thereon in the circuit court for Milwaukee county on the 10th day of October, 1930, for \$3,593.28, the amount then due on said note, and for the further sum of \$547.84 costs, disbursements, and attorney's fees. The finance corporation was not a party originally, but upon its petition it was made a party defendant. It thereupon answered by way of cross-complaint asking foreclosure of the Leitgabel claim for lien which had theretofore been assigned to it. Although the cross-complaint of the finance corporation asked for foreclosure of its lien, it did not demand a deficiency judgment against the Herros, who were legally liable for the amount of the lien claim. The Herros made no answer to the cross-complaint of the finance corporation. Upon the

trial of this action, the fact that the finance corporation had theretofore taken judgment against the Herros on its note, as hereinbefore stated, was informally called to the attention of the trial court by exhibiting to it the original judgment roll in that action. Upon having the matter of the former judgment called to its attention, the court evidently felt that the Herros were being unduly burdened by the finance corporation in seeking to have its lien foreclosed when it had already taken judgment on its note including 15 per cent. attorney's fees. The court evidently reached a somewhat hastily considered conclusion which led it to refuse to entertain a brief on the subject. It informed the finance corporation that it could not have two judgments. Thereafter the court made its findings which recited the facts substantially as hereinbefore stated and specifically found as follows: "48. That said defendant, Heating & Plumbing Finance Corporation did by commencing its action upon said note and recovering judgment in such action against said defendants, Charles H. Herro and Nelley Herro, his wife, elect to waive, and did waive its mechanic's lien upon said premises above described and that it would be inequitable and unconscionable for said defendant, Heating & Plumbing Finance Corporation to recover judgment herein against said defendants, Charles H. Herro and Nelley Herro, his wife, for the amount unpaid upon said claim, for which said amount judgment has heretofore been recovered in this court by said defendant in the action hereinbefore mentioned. That said defendant, Heating & Plumbing Finance Corporation should not recover judgment herein against said defendants, Charles H. Herro and Nelley Herro, his wife."

As a conclusion of law the court found: "7. That there is no sum due said defendant, Heating and Plumbing Finance Corporation, from said defendants, Charles H. Herro and Nelley Herro, his wife, in this action, and that the cross-complaint herein of said defendant, Heating and Plumbing Finance Corporation be dismissed."

Judgment was thereafter entered in which it was adjudged that the finance corporation, by commencing an action upon its promissory note and by recovering judgment in that action against the defendants Herro, waived its claim for a mechanic's lien, and that it would be inequitable and unconscionable to permit the finance corporation to recover judgment of foreclosure of its lien against the defendants Herro, and that

the cross-complaint of the finance corporation be dismissed. From such judgment the finance corporation appealed.

*414 Kaumheimer & Kaumheimer, of Milwaukee (Gifford Alt, of Milwaukee, of counsel), for appellant.

Zebulon Pheatt, of Milwaukee, for defendants respondents.

*415 NELSON, J.

The facts in this controversy are not in dispute. The question for decision is whether the court erred in holding that the finance corporation, by taking judgment on its note, waived the right to foreclose its lien. The court held that the entry of judgment on the note by the finance corporation operated as a waiver of its lien as a matter of law, although there is language in the decision of court which indicates that the court may also have thought that the finance corporation, having elected its remedy by bringing action on the note, could not thereafter take the inconsistent position of asking for the foreclosure of its lien.

It has been consistently held by this court that the lien statutes of this state provide new or additional remedies supplementary to the common-law remedies and that such laws should be liberally construed for the purpose of aiding materialmen and laborers to obtain compensation for materials used and services bestowed upon the property of another enhancing its value. Vilas v. McDonough Manufacturing Co., 91 Wis. 607, 65 N. W. 488, 30 L. R. A. 778, 51 Am. St. Rep. 925; Wiedenbeck-Dobelin Co. v. Mahoney, 160 Wis. 641, 152 N. W. 479.

Section 289.05, Stats., provides that the "taking of a promissory note or other evidence of indebtedness for any such work, labor or materials done or furnished shall not discharge the lien therefor hereby given unless expressly received as payment therefor and so specified therein." Under this statute it is clear, from the well-considered decisions of this court construing it, that the mere giving of a note or other evidence of indebtedness does not in and of itself amount to a waiver. The question of waiver is to be determined by the intention of the parties. Phoenix Mfg. Co. v. McCormick Harvesting Machine Co., 111 Wis. 570, 573, 87 N. W. 458; Carl Miller Lumber Co. v. Meyer, 183 Wis. 360, 365, 196 N. W. 840.

In this action no claim was made by the Herros to the effect that the giving of the note in this case was intended by the parties as a waiver of the lien. No testimony to that effect was offered or received. It is quite apparent that the giving of the note for an amount exceeding the amount due under Leitgabel's contract, which covered financing charges, so as to permit the Herros to pay it in thirty-six equal installments, rather strongly suggests that the lien was to be preserved rather than waived. The note must have been given with the financing charges definitely in mind. With the lien waived the note of the Herros would be wholly unsecured.

While it is no doubt true that a waiver may be implied from facts and conduct of the parties inconsistent with the right to file a lien, such facts, however, must manifest an intention to waive such right. Carl Miller Lumber Co. v. Meyer, supra; Davis v. La Crosse H. Ass'n, 121 Wis. 579, 99 N. W. 351, 1 Ann. Cas. 950.

Whether the giving of a promissory note by an owner to a lien claimant, upon which judgment is thereafter entered, prevents the lien claimant from thereafter proceeding to foreclose his claim for lien, has not been decided by this court. Looking to the decisions of other courts, we find the general rule to be that a lien claimant may bring a personal action against the owner for the amount of the debt for which a lien is claimed as a cumulative remedy without waiving the right to the lien, although there are at least two states which seem to hold otherwise. An extended note upon this subject is found in 65 A. L. R. at page 313, in which a considerable number of the cases are digested. The following cases support the general rule: West v. Flemming, 18 Ill. 248, 68 Am. Dec. 539; Southern Surety Co. v. York Tire Service, 209 Iowa, 104, 227 N. W. 606; Kirkwood v. Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549; F. M. Sibley Lumber Co. v. Murphy, Wayne Circuit Judge, 243 Mich. 483, 220 N. W. 746; Kinzel v. Joslyn, 158 Minn. 194, 197 N. W. 217; Erickson v. Russ, 21 N. D. 208, 129 N. W. 1025, 32 L. R. A. (N. S.) 1072. See also 18 R. C. L. p. 980, and 40 Cor. Jur. p. 367.

Decisions to the contrary appear to be confined to the states of Missouri and Texas. Matthews v. Stephenson Co., 172 Mo. App. 220, 157 S. W. 887; Wycoff v. Epworth Hotel, 146 Mo. App. 554, 125 S. W. 550; Foster v. Spearman Equity Exchange (Tex. Civ. App.) 266 S. W. 583. The underlying theory of the Missouri

decisions is that the account on which the lien must be based merges into a judgment obtained thereon. It seems clear to us that the majority rule is the better rule, considering the remedial purposes of our lien law, and that entry of judgment on either the original indebtedness secured by a mechanic's lien, or on a note given therefor without intention to waive the lien, should not bar foreclosure of the lien. We conclude that no waiver or release of the lien herein resulted by virtue of the entry of judgment under the circumstances of this case.

Nor do we think that the entry of judgment on the note was an election to pursue an inconsistent remedy which prevented the finance corporation from foreclosing its lien. The courts generally hold, as will appear from a reading of the authorities hereinbefore*416 cited, that the rights of a lien claimant to proceed concurrently at common law on a claim, or on a note given to evidence it, and to proceed by foreclosure of his lien, are concurrent, cumulative remedies which may be pursued concurrently. Although a party may generally have two recoveries, he of course is entitled to but one satisfaction.

This court has, in matters somewhat analogous, permitted the bringing of two actions concurrently for the recovery of the same indebtedness. It has been held that a chattel mortgage may be foreclosed after entry of judgment on an indebtedness secured thereby, J. I. Case Threshing Machine Co. v. Johnson, 152 Wis. 8, 139 N. W. 445; Ex parte Logan, 185 Ala. 525, 64 So. 570, 51 L. R. A. (N. S.) 1069; Graham v. Perry, 200 Wis. 211, 228 N. W. 135, 68 A. L. R. 267; and, prior to the adoption of the uniform conditional sales act, that judgment could be entered on an indebtedness secured by a conditional sales contract and that the security reserved could thereafter be relied on, Hyland v. Bohn Mfg. Co., 91 Wis. 574, 65 N. W. 369; Wiedenbeck-Dobelin Co. v. Anderson, 168 Wis. 212, 169 N. W. 615, 12 A. L. R. 500; and that entry of judgment on an indebtedness secured by a real estate mortgage does not prevent subsequent foreclosure of the mortgage, Bliss v. Weil, 14 Wis. 36, 80 Am. Dec. 766; Witter v. Neeves, 78 Wis. 547, 48 N. W. 938; Duecker v. Goeres, 104 Wis. 29, 80 N. W. 91. The only exception to both proceeding at common law on the note and also foreclosing the mortgage is that found in Witter v. Neeves, supra, wherein it was held that after judgment of foreclosure has been entered which provides for a deficiency judgment, no action on the note may the-

reafter be brought. We therefore think it clear, both on principle and on authority, that the general rule established by the decisions of the courts of other jurisdictions permitting the foreclosure of a mechanic's lien, after judgment has been entered on the account or on a note, should be followed in this state.

The respondent contends in this court, apparently for the first time, that since the note given by the Herros to Leitgabel was for an amount considerably in excess of the actual amount due Leitgabel on his contract, made up of certain financing charges, and also including an obligation on the part of the makers to pay 15 per cent. attorney's fees if allowed by law, in case of default, the taking of the note itself, under such circumstances, should be held as a matter of law to have discharged the lien. The respondent relies on Miller-Piehl v. Mullen, 170 Wis. 378, 174 N. W. 542. In that case a lien was filed against one acre of ground. Thereafter a note was given for the amount of the lien and also to cover some additional indebtedness owing to the lien claimant. A mortgage which covered four acres instead of the one acre theretofore covered by the lien was given to secure the note. In that case it was apparently held that the lien had been waived, although that point was not necessary to the decision of the case which involved the validity of the mortgage as a lien on the four acres. This case seems to be somewhat out of harmony with Phoenix Mfg. Co. v. McCormick Harvesting Co., supra, and Carl Miller Lumber Co. v. Meyer, supra, both of which cases were carefully considered and in which it was declared that the intention of the parties is the crucial matter for consideration.

However, this issue which the respondent now seeks to have this court decide was not in any manner raised in the court below. Under the decisions just hereinbefore cited, we think it clear that the intention of the parties as to waiver is a question of fact to be determined by the trial court.

It is well settled that this court generally refuses to consider and dispose of questions on appeal which have not properly or in a timely manner been presented for determination by the trial court. There are, however, exceptions to such rule. Cappon v. O'Day, 165 Wis. 486, 162 N. W. 655, 1 A. L. R. 1657; Braasch v. Bonde, 191 Wis. 414, 211 N. W. 281. These exceptions to the general rule, however, involve questions of law which, though not raised below, may

nevertheless be raised and decided by this court on appeal. The rule seems to be equally well established that where the question raised for the first time on appeal involves factual elements not raised by the pleadings or not brought to the attention of the lower court, this court on appeal will not generally decide such questions. Youngs v. Wegner, 157 Wis. 489, 497, 146 N. W. 803; Harrington v. Downing, 166 Wis. 582, 166 N. W. 318; In re Voluntary Assignment of Milwaukee S. & W. Co., 186 Wis. 320, 202 N. W. 693.

In this case it is very clear that the question of the intention of the parties at the time the note was given was a question of fact to be determined by the trial court. Since the question of intention of the parties was not raised in any manner in the court below or even called to the court's attention, we do not think that such question is here for determination or that, in this state of the record, we could with propriety determine such question.

Since it does appear that the note providing for installment payments was given for the purpose of financing the Herros as to this particular claim, and since an intention to waive the lien under such circumstances *417 could not, in all probability, reasonably be found, we do not think under the circumstances that justice requires that we send this case back for a determination of that particular issue.

Judgment reversed, with directions to enter judgment in favor of the Heating & Plumbing Finance Corporation on its claim for lien.

Wis. 1931.
Roseliep v. Herro
206 Wis. 256, 239 N.W. 413

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9 Mich. 213, 1861 WL 1634 (Mich.)
(Cite as: 9 Mich. 213, 1861 WL 1634 (Mich.))

C

Supreme Court of Michigan.
David Barrows
v.
John A. Baughman and others.
Heard Apr. 9, 10, 1861.
Decided May 1, 1861.

West Headnotes

Mechanics' Liens 257  **1**257 Mechanics' Liens

257I Nature, Grounds, and Subject-Matter in General

257k1 k. Nature of Lien in General. Most Cited Cases

A mechanic's lien cannot be used in order to compel the debtor to give other collateral security for the debt.

Mechanics' Liens 257  **136(5)**257 Mechanics' Liens

257III Proceedings to Perfect

257k133 Form and Contents of Claim or Statement

257k136 Description of Property

257k136(5) k. Description of Building.

Most Cited Cases

Quære, whether, in the case of a claim to establish a mechanic's lien on land, where, by carelessness, only the starting point was set out in the record, instead of the full description of the premises, the statute will not help the defect, and sustain the lien.

Mechanics' Liens 257  **212(1)**257 Mechanics' Liens

257VI Waiver of Right to Lien

257k212 Taking Collateral Security

257k212(1) k. In General. Most Cited Cases

One agreed with a builder to secure the price of the building by a mortgage on the premises. Held, that under this contract the builder could not claim a mechanic's lien; for the two securities were entirely inconsistent.

Mortgages 266  **171(5)**266 Mortgages

266III Construction and Operation

266III(D) Lien and Priority

266k166 Notice of Mortgage Affecting Priority

266k171 Record of Mortgage as Notice

266k171(5) k. Facts of Which Record

Is Notice. Most Cited Cases

A contract for a certain building, which provided that the builder should be secured for his price by mortgage of the premises, was recorded, but by mistake only the starting point was mentioned, when it should have been the description of the land. Held, that this record was not notice of the incumbrance to subsequent mortgagees.

Equity 150  **326**150 Equity

150IV Pleading

150IV(H) Issues, Proof, and Variance

150k326 k. Evidence Admissible Under Pleadings. Most Cited Cases

A bill was filed in chancery to establish a certain lien in priority to two subsequent mortgages on real estate. The ground of the claim was notice to the mortgagees of the contract, but prior notice was not alleged in the bill. Held, that the question of prior notice was not put in issue, and that evidence of such notice could not properly be admitted.

*1 Appeal by complainant from the Wayne circuit, in chancery.

The bill alleged that, on August 17, 1855, John A. Baughman was the owner of a tract of land in Springwells, conveyed to him by Bela Hubbard, containing about eighteen acres, and was about to erect a large and valuable brick house on nine acres thereof, described in the bill, and entered into a contract with Stephen S. Barrows for the building of the same, as follows:

“Articles of agreement made this 17th day of August,

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1855, by and between John A. Baughman, of the city of Detroit, and state of Michigan, of the first part, and Stephen S. Barrows, of the said city and state, of the second part: witnesseth, that the party of the second part, for and in consideration of the covenants and agreements hereinafter named and specified to be performed by the party of the first part, doth agree for himself, his executors, administrators or assigns, to do all the interior joiner work according to the plans and specifications for the same, and the carpenter's and joiner's work of all the piazza, according to specifications signed by the parties to this contract, of a brick building intended for a dwelling-house, and also all the bay windows of said house, which is situated in the township of Springwells, Wayne county, Michigan, being built upon the following described lands, being part of the private claim seventy-seven, beginning at the southeast corner of a tract of land conveyed to John A. Baughman by Bela Hubbard, by deed bearing date July 2, 1855, and recorded in the register's office of Wayne county, in liber 60 of deeds, at page 344, said work to be done in a good, substantial, and workmanlike manner, according to said plans and specifications--said work to be fully done and completed on or before July 1, 1856. For and in consideration of the faithful performance of the foregoing contract, by the party of the second part, covenants and agrees for himself, his heirs, administrators, and assigns, the full and just sum of \$4,000, to be paid within five years after the said work is done, with interest at eight per cent per annum, for which the bond of the first party shall be given, secured by a first mortgage on the above described premises as collateral; and for all work that has been done, or may be done by the day or otherwise not included in said contract prices, and for all materials furnished, or that may be furnished, for said work by second party, shall be paid for by the party of the first part at the usual price for such labor and material so furnished and done. It is further agreed, that the party of the first part is to furnish all the materials for the above described work, and all other work that may be required to be done, at his own proper expense and cost, and of such kind and quality as shall be required for said work, and when wanted by the said party of the second part, alterations in the above described work from the plans, deducting the difference in expense, where it costs less to do the work, and paying for all additional cost and expense that may be added, where the alteration adds to the expense of the work." Which contract was witnessed and acknowledged by the parties, April 2, 1856, and recorded in the register's office of Wayne

county December 24th, 1856.

*2 The bill alleged that it was the intention of both parties to the contract, that Stephen S. Barrows should have a mechanic's lien on said nine acres of land under the statute: "that Bela Hubbard, who was a son-in-law of said Baughman, when said contract was entered into was a subscribing witness to said contract, and he, the said Hubbard, well knew the object of said contract to be the same as hereinbefore set forth, and he had full notice and knowledge of said contract, and the object of it as hereinbefore set forth." It further alleges performance of the contract on the part of Stephen S. Barrows, its assignment to complainant, a refusal to pay on the part of Baughman, whereupon complainant applied to his attorneys to take legal proceedings to obtain payment or security, when for the first time he ascertained that a mistake had been made in drafting said contract, in consequence of which the nine acres intended to be described therein were not described at all, but only the point of commencement in the description was given.

The bill then set forth that Baughman, without consideration, mortgaged said nine acres to Hubbard, March 15, 1856, for \$13,460; that the mortgage has been assigned to E. C. Walker and E. C. Litchfield, who had full notice of the contract, its object and intent, at the time of the assignment, and of complainant's lien under the same; that on December 26, 1856, Baughman also gave a mortgage to N. P. Stewart for \$1,000 on the same premises; that this mortgage was without consideration, or, if given *bona fide*, Stewart had full notice of said contract, and that it was intended to give a lien upon said nine acres. And the bill claims, that if said mortgages were given upon any valuable consideration, they still ought to be postponed to complainant's lien.

The bill prays that the description of land in the contract be corrected; that the Hubbard and Stewart mortgages be declared void; that Baughman be decreed to pay the amount due under the contract, and that the nine acres be sold to pay the incumbrances, including what was due under the contract, in their order.

Baughman, Hubbard and Walker were required to answer under oath.

Walker and Litchfield answered, setting out a valuable

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consideration for the mortgage assigned to them, and denying that they knew anything of the Barrows contract at the time of the assignment.

Hubbard, in his answer, admits his having witnessed the Barrows contract, but avers that, to the best of his recollection and belief, he signed his name as witness at the time of the execution of the contract, and not at the time of the acknowledgment; that he had only a general knowledge of the contents of the contract, that he never read the same to the best of his recollection, and only knew, generally, that it was a contract for the carpenter work on Mr. Baughman's house. He denies that he knew then or knows now how much or what part of the eighteen acres was intended to be described in the contract, or that any part was intended to be so described; or that he knew or had any reason to know that it was the intention of Baughman and Barrows, or either of them, that the contract should create a lien on any portion of the eighteen acres, until he accidentally saw the contract recorded. And he denies that such, at the time of the making of the contract, was the intention, and avers that it was entirely an after-thought of Barrows.

*3 Baughman, in his answer, denies that it was the intention to create a mechanic's lien under said contract, and says he never supposed it was anything but an agreement for a mortgage to be executed when the work was done. And he alleges that the contract was not made at the time of its date, but at the time of its acknowledgment, April 2, 1856.

Stewart alleges his mortgage to have been given for a full consideration, and denies that at the time of taking and recording the same he had any notice of the contract.

Question was made by the answers as to the amount due under the contract, which it is unnecessary to notice. Replication was filed to the several answers, and proofs taken.

The circuit court made a decree, correcting the description in the contract, denying complainant's lien precedence to the Hubbard and Stewart mortgages, dismissing the bill with costs as to Hubbard, Litchfield, Walker and Stewart, and ordering a sale of the nine acres to satisfy \$6,680, found due complainant, with interest at eight per cent from February 21, 1857, unless paid on or before January 1st, 1861.

L. Bishop, for complainant.

E. C. Walker, for defendants, except Stewart.

CHRISTIANCY J.:

We do not think the contract between complainant and Baughman would have entitled complainant to any relief on the ground of a mechanic's lien, had it properly described the land; and (though we give no opinion upon the point) we are not entirely satisfied that, for the purpose of such lien, any further description was necessary, in a case like the present; the tract upon which the house was erected being less than one hundred and sixty acres. See *Comp. L.*, § 5068.

But the contract provides upon its face for a *mortgage* security upon the same land to which the lien is claimed to attach--a species of security entirely inconsistent with the idea of a mechanic's lien upon the same land as a security for the same debt.

The lien authorized by the statute is intended as a security for the *payment* of the debt, and can only be enforced as a means of compelling *payment*. Doubtless such lien may attach and be enforced to compel payment whether the debt be payable in cash or otherwise. But the statute does not give the lien for the purpose of compelling the debtor to give other *collateral security* for the debt, nor does it provide any mode of enforcing it for such a purpose. Yet this is the only purpose, we think, for which the lien could be claimed to exist under this contract. At all events, no remedy could be given upon it in this case as a means of enforcing payment, as the debt is not yet due. But we are satisfied that the statute creates no lien where the parties, by their contract, provide for a different security upon the same land for the same debt which the lien would otherwise secure.

The only remedy, therefore, which it is competent to give to the complainant in this case, is to correct the mistake in the contract by inserting the description of the land, and by enforcing specific performance by a decree for the execution and delivery of the bond and mortgage.

*4 It is fully admitted by the counsel for the defendants, that the nine acres of land described in the bill as that on which the house is situated, was intended to

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be, and ought to have been, inserted in the contract; and we are satisfied such is the fact. The complainant is, therefore, entitled to a decree for such correction. He is also entitled to a decree against defendant Baughman for the execution and delivery by him of a bond, and a mortgage (to secure such bond) on the nine acres, for the amount due on the contract, to be made payable at the time provided in the contract, which was to be five years after the work was completed. The last item of work appears to have been done, and the contract substantially completed, about the twenty-first day of February, 1857. The bond and mortgage must therefore be made payable on the twenty-first day of February, 1862, with interest at eight per cent per annum from the twenty-first day of February, 1857.

As to the amount to be secured by the mortgage, the contract is not entirely clear; it is very loosely drawn, but we think, by fair construction, defendant Baughman was to give his bond and mortgage not only for the four thousand dollars, for work thereafter to be done, as specified in the contract, but also for all the work which had been done or might be done, by the day or otherwise, not included in the contract prices, as well as all materials furnished or to be furnished by the complainant.

[The question of the amount due under the contract is then discussed, and the sum fixed at \$6,740.79, and the opinion then proceeds as follows:]

But admitting that the question of preference could be properly decided in this suit, and that the respective mortgages of Hubbard and Stewart, if taken with full prior notice of the contract, would be postponed to the mortgage to complainant, provided for by the contract (upon which we express no opinion), still we can not, in this case, give complainant a preference over either of said mortgages, for two very conclusive reasons: First, because such prior notice is not averred in the bill, as to the Hubbard mortgage; and secondly, no such prior notice is proved either as to the Hubbard or the Stewart mortgage.

The only portion of the bill which alludes to notice to Hubbard is as follows: "And your orator further shows that one Bela Hubbard, who was the son-in-law of said Baughman, when said contract was entered into was a subscribing witness to said contract, and he, the said Hubbard, well knew the object of the said contract to

be the same as hereinbefore set forth, and he had full notice and knowledge of said contract and the object of it as hereinbefore set forth."

This allegation is not made in connection with, or with reference to, the mortgage to Hubbard, and can only be construed as an averment of notice of the contract at the time it was executed and witnessed. The bill alleges that it was witnessed and acknowledged on the second day of April, 1856. Such at least we think is the fair import of the allegation; at all events there is no allegation of its being witnessed at any other time, nor that it was witnessed before the date of Hubbard's mortgage. The bill states the Hubbard mortgage to have been dated the fifteenth day of March in the same year.

*5 Prior notice to Hubbard was not, therefore, put in issue; and no evidence of such notice could properly be admitted: *Warner v. Whittaker*, 6 Mich., 133; *Bloomer v. Henderson*, 8 Mich., 395. But, had it been properly in issue, no such notice was proved in this case. Hubbard was required to answer on oath, and he denies that he knew that any part of said land was intended to be described in the contract. The only testimony which goes to show prior notice to Hubbard is that of Stephen S. Barrows, the contractor. To say nothing of any interest or bias he may be supposed to have, we are satisfied that the weight of even his testimony (though somewhat contradictory and confused) when taken together, and considered with reference to all the circumstances, tends rather to show that the contract was not executed and witnessed till about the date of its acknowledgment (April 2, 1856), some eighteen days after the execution of the mortgage to Hubbard, and that Hubbard could not therefore have had notice of the contract when he took the mortgage.

The answer of Stewart denies notice, actual or constructive. Prior actual notice is not claimed to have been shown by the evidence, as to him. But, as his mortgage was taken two days after the recording of the contract, it is claimed that the record was constructive notice of the contract.

But, admitting (without intending to decide) that the record might, without any description of the land, have been notice of a mechanic's lien had the contract been in other respects sufficient to create such lien; yet, as it could not so operate, for other reasons already given,

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the record could only operate as notice to the extent of the land described in it. And the description must be such that by construction, or by the aid of the references contained in it, the land intended may be specifically ascertained by metes and bounds. Here is no such description, by reference or otherwise. A single mathematical point only is described, as a starting point, and, though an inference may perhaps be drawn from the instrument that some land was intended to be included, and was omitted by mistake, yet when considered without reference to a mechanic's lien (as to which it might perhaps be aided by the statute) no one can say, from any thing contained or referred to in the contract, what was the specific land upon which a mortgage was to be given.

The decree dismissing the bill, as to Hubbard, Litchfield, Walker and Stewart, must be affirmed, with costs; and a decree must be entered against defendant Baughman, in accordance with the foregoing opinion. But as, on the one hand, the decree of the court below has been slightly increased, and on the other, has been materially narrowed by our decree, in refusing the remedy by foreclosure, given by the court below, and by postponing for one year the time of payment, neither complainant nor defendant Baughman is entitled to the costs on appeal. But complainant is entitled to costs, as against defendant Baughman, in the court below.

The other justices concurred.

Mich. 1861.
Barrows v. Baughman
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C

Court of Appeals of Maryland.
 WILLISON
 v.
 DOUGLASS.
 November 12, 1886.

Appeal from circuit court, Allegany county. In equity.

Bill to enforce mechanic's lien. Decree of dismissal.
 Plaintiff appeals.

West Headnotes

Mechanics' Liens 257  216(1)

257 Mechanics' Liens

257VI Waiver of Right to Lien

257k216 Estoppel to Claim Lien

257k216(1) k. In General. Most Cited Cases

Where, in consideration of an agreement for cash payments and for a mortgage for the balance of the contract price of a building to be erected, the plaintiff, who furnished the lumber, and the contractor, jointly, have entered into a bond with defendant to save him harmless from all liability for labor done upon or material furnished for the building, and defendant has made the cash payments, and offered to execute the mortgage, and, on plaintiff's objection to his title, has offered the amount to be secured by the mortgage in cash, plaintiff is estopped from prosecuting his claim for a lien; the agreement for the mortgage amounting to a direct waiver of his right to a lien.

*530 *Josiah H. Gordon and Robert H. Gordon*, for appellant.

David W. Sloan and A. Hunter Boyd, for appellee.

YELLOTT, J.

The appellant filed a bill in the circuit court for Allegany county for the enforcement of a mechanic's lien. No question in *531 relation to the regularity of these proceedings has been presented. If it be conceded that the plaintiff ever had any lien which could be enforced, the mode of procedure has been in strict conformity with the requirements of the statute. That the

materials for the erection of the building were furnished, is not denied; but the question presented for determination is in relation to the proper construction and effect to be given to certain agreements entered into by the parties interested some months anterior to the time when this lien claim was filed. These proceedings were commenced on the twenty-ninth day of December, 1882. The claim is for materials furnished between the twenty-fifth day of May, 1882, and the twenty-second of September in the same year. On the third day of June, 1882, which was very shortly after the first delivery of materials, an agreement under seal was executed by Schofield, the contractor, by Willison, the plaintiff, who furnished the lumber, and by one Brady jointly. By the terms of this contract the building was to be erected, in conformity to the specifications, for the sum of \$1,493. These specifications, under seal, were signed by the parties aforesaid, who at the same time executed a bond, by the condition of which they were to "save the said John C. Douglass harmless from any and all liability for work and labor done upon or materials furnished for said building beyond the sum of \$1,493." Douglass then signed an agreement to pay \$500 on delivery of the lumber, and another sum of \$500 on completion of outside building, and to execute a mortgage in favor of Willison for \$493, bearing interest at 5 per centum per annum, and payable in two years. The proof shows that \$1,000 was paid by Douglass in cash, in accordance with the terms of the agreement, and the plaintiff, Willison, admits in his testimony that he agreed to receive from Douglass a mortgage as security for the balance, amounting to \$493. It is shown by the evidence that Douglass afterwards offered to execute the mortgage, and that Willison refused to accept it, on the ground that Douglass only had an equitable title to the property; and that Douglass then offered to pay the sum intended to be secured by the mortgage in cash, which offer was rejected by Willison. It is also proved that Douglass has already paid other lien claims on the said building, amounting to \$395.42, under a decree of the circuit court for Allegany county. As the plaintiff had entered into a bond to save the defendant harmless from all sums in excess of \$1,493, it follows that in no aspect of this case can Douglass be held liable for more than \$97.58; whereas the claim now sought to be enforced by the plaintiff amounts to the sum of \$851.96.

Whether the contract entered into by the parties, and a part compliance by the defendant by the payment of \$1,000, and his offer to fully comply with all the terms of said contract by the execution of a mortgage or the offer of payment in cash of the sum intended to be thereby secured, operated as a waiver of the lien, is the sole question presented for determination in this appeal. It is provided by section 3, art. 67, Revised Code, that a mechanic's lien shall not be considered as waived "by granting a credit, or receiving notes or other securities, unless the *532 same be received as payment, or the lien be expressly waived;" but it is manifest that, if an express contract under seal be entered into inconsistent with the operation of a lien, the lien is expressly waived by the legal effect of such express contract. This seems to be a general principle applicable to all liens created by operation of law. In *Crawshay v. Homfray*, 4 Barn. & Ald. 53, it was said by BEST, J., that, "unless the special agreement be inconsistent with the right of lien, it will not destroy it." It follows that, if parties interpose a special contract inconsistent with the existence of a lien, the lien does not attach. This principle is enunciated in *Pickett v. Bullock*, 52 N. H. 354. The ground on which the decision rests is apparent. A mechanic's lien, like any other liens which courts are called upon to enforce, is not created by contract. It is brought into operation by the established law of the land, and, in the absence of special arrangements to the contrary, parties are presumed to have contracted for work and materials with reference to this law. But no statute will be so construed as to prohibit the formation of contracts not in conflict with public policy. If, therefore, parties deem it advisable to enter into an agreement inconsistent with the existence of a lien, the statute will not be construed to operate so as to create a lien, and thereby destroy the special contract.

In *Grant v. Strong*, 18 Wall. 623, the supreme court of the United States decided that "taking real-estate security for the price for erecting a building is inconsistent with the idea of a mechanic's lien, and no such lien attaches." And in *McMurray v. Brown*, 91 U. S. 257, Mr. Justice CLIFFORD, in delivering the opinion of the court, said: "Examples of the kind, such as a trust deed or mortgage, may be mentioned, which are regarded as a species of security inconsistent with the idea of a mechanic's lien upon the same property for the same debt." That the taking of a mortgage on the same property as a security for the same debt is a

waiver of a mechanic's lien has been decided in a number of cases, and there seems to be no authorities to the contrary in any of the states. *Trullinger v. Kofoed*, 7 Or. 228; *Williams v. Roberts*, 5 Ohio, 35; *Gilman v. Brown*, 1 Mason, 191; *Lagow v. Badollet*, 1 Blackf. 416.

The principle established by the authorities just cited was recognized by this court in the case of *Trustees of German Lutheran Church v. Heise*, 44 Md. 479. In that case the trustees held a bond against all lien claims, and the court said:

"Unless the bond has been discharged, as contended by the claimants, it stands liable for all the liens that have been claimed and established for work and materials supplied to the contractors for the erection of the church, and which may not be paid by the contractors, or with the money due them on the contract; and it would be against equity and justice to allow the claimants to proceed with the enforcement of their lien, even to the sale of the church, regardless and in the face of their bond that no such lien should exist."

Can there be a doubt that, when the parties to this cause entered into the agreement already referred to, it was their intention that its terms should be strictly complied with? The plaintiff is one of the obligors *533 on a bond intended to protect the defendant against all lien claims beyond a certain amount. That amount the defendant agreed to pay in cash and by giving a mortgage. The cash payments have been made, and the defendant has offered to give a mortgage, or to pay the sum intended to be secured by it in cash. If the plaintiff refused to accept the mortgage, then he ought to accept the money which the defendant offered to pay, and the payment of which would render the execution of a mortgage unnecessary. He refused to do either. The learned judge in the circuit court was therefore clearly right when he said:

"But regarding, as I do, the agreement for the mortgage in this case as a direct waiver of the plaintiff's right to a lien for the materials that he was thereafter to furnish and did furnish, and finding neither refusal nor hinderance on the part of the defendant Douglass to comply with said agreement in respect to said mortgage on his part, it seems clear that reason, equity, and the authorities require that the plaintiff should be estopped in the further prosecution of his claim for lien upon the property mentioned in these proceed-

ings.”

The decree of the circuit court dismissing the bill should therefore be affirmed. Decree affirmed, with costs to the appellee.

Md. 1886.
Willison v. Douglass
66 Md. 99, 6 A. 530

END OF DOCUMENT



Supreme Court of Oregon.
 CHARLES K. SPAULDING LOGGING CO.
 v.
 RYCKMAN et al.
 INTER STATE FIDELITY BUILDING & LOAN
 ASS'N
 v.
 PUTNAM et al.
 Dec. 15, 1931.

Department 1.

Appeal from Circuit Court, Yamhill County; H. K. Zimmerman, Judge.

Suit by the Charles K. Spaulding Logging Company against Earl Ryckman and others. From part of the decree plaintiff appeals, and defendant Inter State Fidelity Building & Loan Association files a cross-appeal from part of the decree.

Modified, affirmed as modified, and remanded with directions.

West Headnotes

[1] Mechanics' Liens 257 ↻155

257 Mechanics' Liens
257III Proceedings to Perfect
257k155 k. Mode and Sufficiency of Filing or Record of Claim or Statement. Most Cited Cases
 Failure to collect fee therefor in advance would not nullify filing and recording of mechanic's lien claim. ORS 87.035, 87.050, 204.845, 205.320 note.

[2] Mechanics' Liens 257 ↻155

257 Mechanics' Liens
257III Proceedings to Perfect
257k155 k. Mode and Sufficiency of Filing or Record of Claim or Statement. Most Cited Cases
 Clerk accepting custody of mechanic's lien claim and part of filing fee had duty to record instrument without delay. ORS 87.035, 87.050, 204.845, 205.320 note.

[3] Mechanics' Liens 257 ↻155

257 Mechanics' Liens
257III Proceedings to Perfect
257k155 k. Mode and Sufficiency of Filing or Record of Claim or Statement. Most Cited Cases
 That mechanic's lien claim timely filed was recorded after time for filing expired held immaterial. ORS 87.035, 87.050.

[4] Mechanics' Liens 257 ↻155

257 Mechanics' Liens
257III Proceedings to Perfect
257k155 k. Mode and Sufficiency of Filing or Record of Claim or Statement. Most Cited Cases
 Mechanic's lien claim timely filed held not invalidated because only part of filing fee was then paid; amount being then unknown and balance being paid after time for filing expired. ORS 21.710, 87.035, 87.050, 204.845, 205.010, 205.320 note.

[5] Mechanics' Liens 257 ↻213

257 Mechanics' Liens
257VI Waiver of Right to Lien
257k213 k. Taking Mortgage on Same Property. Most Cited Cases
 Mechanic's lien claimant taking mortgage upon same or other property as security for debt waives lien.

[6] Mechanics' Liens 257 ↻198

257 Mechanics' Liens
257IV Operation and Effect
257IV(C) Priority
257k198 k. Liens and Incumbrances in General. Most Cited Cases

Mortgages 266 ↻159

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k159 k. Priority as Affected by Provi-

sions of Mortgage or by Agreement. Most Cited Cases Mechanic who agreed to take second mortgage to secure debt, but filed lien claim instead, held estopped to assert priority over first mortgagee who changed his position in reliance upon mechanic's agreement.

****26 *231** Clarence Butt, of Newberg, and Robt. F. Maguire and Normal Kuykendall, both of Portland (Winter & Maguire, of Portland, on the brief), for appellant.

E. K. Oppenheimer, of Portland (Wilbur, Beckett, Howell & Oppenheimer and A. H. Lewis, all of Portland, on the brief), for cross-appellant.

Edward J. Clark, of Portland (S. Fred Wilson, of Portland, on the brief), for cross-appellant on its own appeal.

R. H. Bassett, of Salem, for appellee Nelson Bros.

RAND, J.

[1][2][3][4] The Charles K. Spaulding Logging Company commenced this suit, seeking to enforce a lien for lumber and material furnished to the defendants Ryckman and wife for use in the construction of an apartment house then owned by them. Nelson Brothers, Inc., also claimed a lien against the building for labor and material furnished. It answered the complaint, setting up its lien and praying for its foreclosure. During the course of construction, Ryckman and wife mortgaged the building and premises to the Inter State Fidelity Building & Loan Association, hereinafter referred to as the loan company, and later sold and conveyed the premises to the defendant Susan Martin. The owners defaulted by failing to pay certain stipulated interest installments, and, under an acceleration clause, all sums payable under the mortgage had become due and collectible. The loan company jointly ***232** with the Ryckmans and Martin answered, denying the validity of plaintiff's lien and setting up the mortgage and praying that it be foreclosed, and, in another answer, the loan company denied the validity of the lien of Nelson Brothers, Inc. The two other defendants failed to appear and are in default. The cause was tried and a decree entered in the court below foreclosing the mortgage and the lien of Nelson Brothers, Inc., but refusing to foreclose plaintiff's lien, holding it to be invalid and unenforceable. From the part of the decree so holding, plaintiff appealed. The loan company also appealed from

that part of the decree foreclosing the lien of Nelson Brothers, Inc., and now contends that the lien is invalid, and therefore is not entitled to priority over the mortgage.

Hence the sole question for decision is: Are both or either of the liens valid?

The objection to the validity of plaintiff's lien grows out of the following admitted facts: The plaintiff's claim of lien was properly prepared and verified, and contained a true statement of plaintiff's claim. It was filed for record, and a part of the filing fee paid within the time allowed by law; but the balance of the fee was not paid and the claim was not recorded until after the expiration of the time fixed for the filing of the same. It is contended that, under these circumstances, the lien is invalid.

The only competent evidence, the testimony offered by the county clerk being purely hearsay and incompetent, was that of the deputy county clerk who received the instrument and indorsed it as filed, and accepted a part of the filing fee. In respect to this matter, she testified that she first saw the instrument on May 8, 1929, when it was presented and left with her for filing ***233** by Houser, the sales manager of plaintiff. In detailing the transaction which then occurred, she says: "I expect I asked if he wanted to have it filed and recorded, I usually do, I can't say what I said to him; he wanted to know how much the recording fee was, and I said I would have to figure it up, and he said he believed he wouldn't wait, but I should file it, and I said I would figure it first anyway, as I remember it, and when he did let me know, I would remember it, which I did. He paid 50¢ filing fee and I filed it as I do any instrument."

She further testified that, after filing the paper, she placed it with other chattel liens in the office where it remained unrecorded until July 15, 1929, when the balance of the filing fee, amounting to \$7.70, was paid and the lien was recorded. The law requires that liens of this character shall be both filed and recorded. Sections 51-105 and 51-106, Oregon Code 1930. Under the first section, the time in which the claim of lien must be filed for record is fixed, and, unless so filed for record within the time prescribed, the right to a lien is lost; but after it has been filed for record, the duty of recording it rests upon the county clerk, who alone is charged with the duty of its performance. The

question therefore is whether a claim of lien filed within the time allowed is invalidated by reason of the fact that only a part of the filing fee was then paid, the amount being then unknown, and the balance having been paid after the time for filing had expired. Section 27-3013, Oregon Code 1930, prescribes that the fees for filing and recording an instrument of this character "shall be collected in advance *** and none of the services therein mentioned shall be rendered until the fee therefor has been paid to and received by the officer; and said officer shall enter *234 an account of the fees provided for by this act in books kept in his office, and pay all such fees to the treasurer of the proper county each day for the use and benefit of such county." It is clear from these provisions that, since the fee for the filing of this instrument**27 was paid in part only, the authority for the filing of the instrument did not exist, and the act done in respect thereto is nugatory, unless the effect of this provision is overcome by some other section of the Code. But section 27-3022 provides that "if the officers named in section 27-3021," (the county clerk is one of the officers so named), "neglect or fail to collect in advance all fees *** which by the provisions of this act are to be paid to the county treasurer of said county, such officers shall be held liable on their official bond for the amount so remaining uncollected, and such amount shall be deducted from the salary of the officer failing to collect or pay the same over." It will be noted that, under the provisions of the section last quoted, this section neither expressly nor impliedly prescribes that if the fee is not paid in advance the officer shall not act, or that if he does so act the thing done is to be of no force and effect. On the contrary, it prescribes that if he acts in a matter where a fee is chargeable therefor, and which when paid belongs to the county, he and his bondsmen become personally responsible to the county for the payment of the fee which should have been collected in advance. Now, it must be obvious that no officer can collect or be responsible to the county unless some service upon his part has been performed or undertaken, and, under the provisions of this section, there can be no fee payable to the county unless some official act has been done or some service performed or undertaken by such officer; and, clearly, if an act was done before the fee *235 had been paid, if the action taken was illegal and void and was to be of no force or effect, then the county could have no just claim to the uncollected fee, and it is not supposable that the Legislature intended that payments should be made by the clerk or his bondsmen for the doing of some act by an officer unless that act,

when done, was to have some force and effect. Hence, when both sections of the statute are considered together and effect given to all their provisions, it would seem to follow that the filing and recording of an instrument, in a case where the fee therefor was not collected in advance would not be a mere nullity nor render the act of filing and recording of such instrument a mere nullity; but that said acts were to have the same force and effect as if the fee had been collected in advance and before the service had been performed. Particularly, we think this is so where a part of the fee was paid before any of the services were performed, and the balance of the fee has since been paid. It is clear from the testimony of the officer, to which we have referred, that, in taking this instrument and filing it for record, Houser intended to make a valid filing, and it must be presumed, in the absence of any testimony to the contrary, that, when he asked the amount payable therefor, he was prepared and intended to pay the entire amount, and that he would have done so if that amount had been known at that time.

There is no provision in any statute fixing any definite amount for the recording of a mechanic's lien. The statute provides that the amount shall depend upon the number of folios contained in it, and defines a folio as one hundred words, counting each two figures as one word. Section 27-3038. The charge fixed for recording such an instrument is twenty cents *236 for each folio. This lien contained an itemized statement of lumber sold for an aggregate price of \$5,296.67, upon which certain credits had been given, reducing the amount of the claim to \$3,857.65. The charge finally ascertained and paid for the filing and recording of this instrument was \$8.20. If this amount was correctly computed, the lien contained forty or more folios of words, counting two figures for one word. From this it is clear that the amount of the fee could not be fixed without an actual count and a computation based thereon. Hence, under the circumstances stated, it was the duty of the county clerk, when this paper was presented for filing, to make the count and compute the charge and exact payment in full in advance, and, if such payment was not made, to then decline the custody of the paper and declare the grounds of his refusal as held in McDonald v. Crusen, 2 Or. 258. Had that been done, the whole fee presumably would have been paid; but, instead of doing so, the officer accepted the custody of the paper and placed it in the files of the office after having indorsed it as filed over the signature of the county clerk and her own, and subsequently, when the amount had been ascertained, accepted payment in full and

recorded the instrument. Having accepted the custody of the paper and a part of the fee, we think it was the duty of the clerk to record the instrument without delay, and to look to Houser for the remainder of the fee, and, if not paid by Houser, to himself become responsible for and pay the county the uncollected part of the fee.

The fact that the instrument was not recorded until after the time for filing had expired, we do not deem to be of much importance. Instances may arise, and probably do, where a number of liens of this character are filed in the office of the county clerk during the *237 last hour of the last day of filing, and which of necessity cannot be recorded before the next succeeding day. It is clear that, in a case of that kind, the claim of lien would not be defeated because not recorded until after the time for filing had expired.

In support of its contention that this lien is invalid, the loan company cites Hilts v. Hilts, 43 Or. 162, 72 P. 697, and Hart v. Prather, 61 Or. 7, 119 P. 489, and contends that **28 this question is foreclosed by those decisions. Both those decisions are based upon an entirely different section of the statute, and relate to the filing of a transcript upon appeal. Both cases were governed by section 29-106, Oregon Code 1930, which prescribes the amount of the filing fee for filing a transcript upon appeal. This amount is definite and certain, and the same filing fee is applicable alike in all cases. Other provisions of the same section makes it the duty of the clerk of the court receiving the paper for filing to exact payment of the filing fee in advance, and expressly provides that "No *** transcript on appeal *** shall be filed therein until such payment is made." That section has no application to the filing and recording of the paper involved here. Therefore those decisions are not conclusive upon this appeal. Here we have two sections of the statute, each being a part of the same act, the one requiring payment in advance and directing that the services shall not be performed unless the fees therefor have first been paid, and the other providing, in effect, that if the services are performed in violation of the provisions of the first statute, then the officer performing them shall himself become responsible for the uncollected fee, and there is no express provision in the latter section that an act done in violation of the first statute shall be invalid or void. Hence, we hold in accordance with what we believe to *238 be a reasonable construction of the provisions of the two sections, that although it

was the duty of the officer to refuse to accept this instrument for filing until the entire fee had been paid, yet by his accepting and filing it and placing it among his files, thereby making himself personally liable for the uncollected part of the fee, his filing of it was not a mere nullity and did not operate to make the subsequent recording of it after the balance of the fee had been paid invalid or defeat the existence of the lien, since the rights of no innocent purchaser or subsequent lienor without notice are involved in the case.

The lien claimed by Nelson Brothers, Inc., is in part based upon the performance of labor and the furnishing of material under a special contract, which was entered into on December 10, 1928, between Ryckman and the lienor. In and by the terms of the contract, the lienor agreed to install a heating system in the building for the sum of \$2,480, for which Ryckman agreed to pay:

"\$500.00 in cash when said system has been roughed in, the balance of \$1980.00 to be secured by a second mortgage on said premises payable \$50.00 per month, all deferred payments to draw interest at the rate of 7% per annum, payable monthly; the first of said payments to be made within ten days after the job has been completed by the party of the second part.

"It being understood and agreed that the party of the first part shall execute and deliver to the party of the second part said note for the balance due under the contract upon demand together with a second mortgage on the premises securing said note, said premises to be free from all encumbrances save and except a first mortgage."

*239 The lien filed recited: "That the terms on which said material was furnished and labor performed are: As to the heating system \$500 in cash when said system had been roughed in; the balance of \$1980 payable \$50 per month, all deferred payments to draw interest at the rate of seven per cent. per annum, payable monthly, secured by a second mortgage on said building and real premises, said real premises to be free of all incumbrances save and except a first mortgage; and as to the \$200 contract for extra plumbing, for extra apartment, cash upon completion and the whole sum is now past due."

The answer filed by Nelson Brothers, Inc., which sets up the lien and prays for its foreclosure fails to allege

any demand for the execution and delivery of the stipulated note and mortgage, and does not allege fraud; nor does it contain any prayer for the specific performance of this contract. It alleges that no part of the sum of \$2,680 has ever been paid, and that the whole of said sum is now due and payable, but it does allege that no note or mortgage has ever been given. The validity of this lien is attacked upon two grounds: First, that it is based upon a special contract which extends the time of payment beyond the time allowed by law for the enforcement of a lien, and therefore constituted a waiver of the right to claim a lien for services performed under it; and, second, upon the ground that the lienor is estopped to assert its claim for lien because the loan company made the loan and accepted the mortgage in reliance upon the stipulation contained in the contract that the lienor was to accept a second mortgage upon the premises as security for the payment of its claim, and not to assert or claim any lien therefor which would or might have priority over its mortgage.

[5][6] It is settled by Trullinger v. Kofoed, 77 Or. 228, 33 Am. Rep. 708, that, where a lien claimant takes a *240 mortgage upon the same or other property as security for his debt, he thereby waives his right to a lien. In that case the court cited, among other cases, Barrows v. Baughman, 9 Mich. 213, where the court, after announcing the principle that a mortgage is "a species of security entirely inconsistent with the idea of a mechanic's lien upon the same land as a security for the same debt," then said: "*** The statute creates no lien where the parties, by their contract, provide for a different security upon **29 the same land for the same debt which the lien would otherwise secure."

In the Trullinger Case, a mortgage had actually been given; while in the instant case, although expressly contracted for, no mortgage has been given. Does this difference of facts affect or change the rule announced in the Trullinger Case? We think not.

In Willison v. Douglas, 66 Md. 99, 6 A. 530, 532, the court, after pointing out that a mechanic's lien is created by statute, and that, in the absence of special arrangements to the contrary, parties are presumed to have contracted for work and material, with reference to this law, said: "*** But no statute will be so construed as to prohibit the formation of contracts not in conflict with public policy. If, therefore, parties deem

it advisable to enter into an agreement inconsistent with the existence of a lien, the statute will not be construed to operate so as to create a lien, and thereby destroy the special contract."

Again, in Weaver and Pennock v. Demuth, 40 N. J. Law, 238, the court cites with approval the holding in Barrows v. Baughman, supra, and then said:

"The agreement for a particular kind of lien upon the same property, to which the mechanics' lien would *241 usually attach, must necessarily be exclusive of all other liens. Such must evidently be the purpose when the agreement is made, though they may not state it in express words, and such would be the construction which others, in dealing with the property, would ordinarily put upon it. In legal effect the contractor waives his lien to obtain another in a different form. This he may do if he choose, for this is a statute designed for the benefit of individuals of a particular class, and not for general objects, hence its benefits may be waived. Quick v. Corlies, 10 Vroom [39 N. J. Law] 11.

"There are building contracts which stipulate for the payment in money, property, notes or other securities, and all are equally good, and the statutory remedy is available unless by the terms it is excluded. Thus, if notes be given and the credit be extended beyond the time for bringing the action, the remedy by lien is lost, because it is inconsistent with the statute. So, as in this case, if the bargain is made for a specific lien on the same property, another lien for the same debt by statute must be waived, because of its inconsistency. It was conceded, on the argument, that this would be the effect if the contract were executed; but as it is executory, it was contended that the plaintiff may well resort to his remedy under the statute."

In answering this contention, the court said: "This general rule as to waiver will be ordinarily true, but suppose the builder bargains for a specific lien on the property improved by his labor and material, may he, for any reason excepting fraud, rescind his contract and claim another form of lien, given him by statute? This case, in my judgment, stands on the contract made between the parties, and the remedy for its breach must be sought within and not outside of it. The contractor must obtain the lien promised, or its equivalent in damages, and not the lien by statute which he has constructively agreed to abandon with-

out any condition or reservation.”

These principles we think are controlling here. Nelson Brothers, Inc., having entered into a special agreement *242 stipulating the manner and time of payment and the security to be given therefor, must abide by its contract. If entitled to relief, the relief must be based upon the stipulation entered into and not upon the statute. It is true that part payment was not made as agreed, and that no mortgage was given; but under the terms of the contract, the mortgage was to be given upon demand, and no demand was made. Instead of demanding performance, Nelson Brothers, Inc., abandoned all parts of the contract, except the stipulated price, and filed a lien therefor, claiming priority in payment over the mortgage of the loan company, as to which it had stipulated its mortgage should be a second mortgage. Relying upon the stipulations contained in the special agreement, the loan company has changed its position and parted with its property, and therefore Nelson Brothers, Inc., are estopped from asserting a lien having priority over the mortgage for any part of the labor or material for which it had agreed to accept a second mortgage. As said in *Trullinger v. Kofoed*, supra: “*** In these cases of waiver, if it only concerned the immediate parties, it would ordinarily be a matter of little consequence how it was determined. ‘But when the acts of individuals become the motive to the conduct of others, it is important that such acts should be made to bear their natural construction, so that deceit and imposition upon third persons may be prevented. And though one of the parties to the transaction is overreached or was in error as to its consequences, that error cannot be remedied at the expense of third persons.’”

But it does not follow from this that the lien of Nelson Brothers, Inc., is wholly invalid. Of the amount claimed, \$200 thereof was for labor and material furnished under another contract which was to be paid *243 for in cash when the work was completed, and \$500 of the price for the work done under the special agreement was also to be paid for in cash while the work was being performed. Neither of these two sums have been paid, and each constitutes an item for which a lien may be claimed. The claim of lien was filed in good faith, and obviously under a mistake of law. Both items may be segregated from the balance of the amount claimed without resort to any extrinsic evidence. We therefore hold that the lien is valid for the sum of **30 \$700 with interest thereon as stipulated at

the rate of seven per cent. per annum from the time when said sums were payable, and that the lien for said amounts is entitled to priority over the mortgage. For the remainder of the amount due, namely, \$1,980 and interest thereon as provided in the contract, Nelson Brothers, Inc., are entitled to and will be given judgment; but it shall in all respects be subject to the mortgage.

For the reasons stated, the cause will be remanded to the court below, with directions to enter a decree foreclosing plaintiff's lien and awarding to plaintiff its costs and disbursements and a reasonable attorney's fee to be fixed from the evidence already offered in the cause; also foreclosing the lien of Nelson Brothers, Inc., for the sum of \$700, with interest thereon as provided in the contract, and awarding judgment to Nelson Brothers, Inc., for the sum of \$1,980, with interest thereon as provided in the contract, and directing that the lien of said judgment shall be subject to the lien of the mortgage. Except as so modified, the decree appealed from will be affirmed.

BEAN, C. J., and ROSSMAN and KELLY, JJ., concur.

Or. 1931.
Charles K. Spaulding Logging Co. v. Ryckman
139 Or. 230, 6 P.2d 25

END OF DOCUMENT

11 Wis. 289, 1860 WL 4596 (Wis.), 78 Am.Dec. 706
(Cite as: 11 Wis. 289, 1860 WL 4596 (Wis.))

C

Supreme Court of Wisconsin.
BAILEY and another
v.
HULL.
January Term, 1860.

West Headnotes

Mechanics' Liens 257 ↪ 33(1)

257 Mechanics' Liens

257II Right to Lien

257II(A) Nature of Improvement

257k33 Improvements Outside Building

257k33(1) k. In General. Most Cited

Cases

The 12th section of the act concerning the lien of mechanics and others which provides that "any person performing manual labor upon any land, timber or lumber," shall be entitled to a lien thereon, to be enforced according to the provisions of this act, was certainly designed to include all labor done directly upon the land, for the purpose of preparing it for use, and will include the making of fences on the land, and an action may be maintained therefor.

Mechanics' Liens 257 ↪ 35

257 Mechanics' Liens

257II Right to Lien

257II(B) Services Rendered and Materials

Furnished

257k35 k. Nature of Services in General.

Most Cited Cases

The statute giving a lien for manual labor performed upon any land, timber, or lumber gives a lien on the land for the charge of building a fence on it.

Mechanics' Liens 257 ↪ 161(4)

257 Mechanics' Liens

257IV Operation and Effect

257IV(A) Amount and Extent of Lien

257k161 Amount Secured in General

257k161(4) k. Interest and Costs. Most

Cited Cases

If a note taken for the debt, and payable within the term of the lien, is made to bear interest, the lien secures the interest as well as the principal.

Mechanics' Liens 257 ↪ 211(1)

257 Mechanics' Liens

257VI Waiver of Right to Lien

257k211 Taking or Transfer of Bill or Note

257k211(1) k. In General. Most Cited Cases

A party having a mechanics' lien upon land, may contract by note for the payment of the debt, and fix the rate of interest, as in other contracts.

Mechanics' Liens 257 ↪ 211(3)

257 Mechanics' Liens

257VI Waiver of Right to Lien

257k211 Taking or Transfer of Bill or Note

257k211(3) k. Time of Maturity of Note.

Most Cited Cases

A mechanic's lien is not waived by taking a note to become due before the time limited by law for the enforcement of the lien.

Mechanics' Liens 257 ↪ 211(3)

257 Mechanics' Liens

257VI Waiver of Right to Lien

257k211 Taking or Transfer of Bill or Note

257k211(3) k. Time of Maturity of Note.

Most Cited Cases

A party having a mechanics' lien upon land, does not waive the same by taking a note for the amount, unless the time of payment is extended beyond the year in which he is required to commence his action.

Mechanics' Liens 257 ↪ 291(6)

257 Mechanics' Liens

257XI Enforcement

257k291 Judgment or Decree

257k291(6) k. Directions as to Sale or

Lease, and Priorities and Distribution of Proceeds.

Most Cited Cases

A judgment entered under the act concerning the lien of mechanics, must order the land to be sold upon

11 Wis. 289, 1860 WL 4596 (Wis.), 78 Am.Dec. 706
(Cite as: 11 Wis. 289, 1860 WL 4596 (Wis.))

execution, as in ordinary cases.

Mechanics' Liens 257 ↪ 292

257 Mechanics' Liens

257XI Enforcement

257k292 k. Execution and Enforcement of Judgment in General. Most Cited Cases

A judgment under the mechanic's lien law must order a sale of the land on an ordinary execution, with such modification of the execution as may be necessary. The sheriff cannot sell on the judgment merely without execution.

*1 APPEAL from *Milwaukee* Circuit Court.

This was an action brought by the plaintiffs, to enforce a mechanic's lien, claimed by them upon certain real estate of the defendant. The petition for the lien and the complaint alleged that the plaintiffs performed labor and furnished materials in the erection of an iron fence on certain lots of the defendant, in the city of Milwaukee, on which the defendant's dwelling house was situated, pursuant to a contract made with him, the same being finished October 3, 1857; that there was a balance of \$305 unpaid at that date, for the work and materials, on which the defendant promised to pay interest at ten per cent. until paid; that on the 5th of that month the defendant, in acknowledgment of the indebtedness to the plaintiffs, and to secure the same, gave them his two promissory notes, one at sixty days from that date, the other being taken up and a new note given in lieu of it by the defendant, January 25, 1858; that both notes are unpaid and unsecured, and are in the plaintiffs' possession, ready to be canceled. The complaint claimed judgment for \$305, and interest at ten per cent. from Oct. 3, 1857, and that the real estate described might be sold to pay the same.

No answer was served, and judgment was taken October 30, 1858. The judgment was in favor of the plaintiffs, against the defendant, for the amount found due, including interest at ten per cent., for a lien upon the premises described in the complaint, to that amount, to secure the payment thereof; and ordering the sale of the premises, to make the amount of the judgment.

1859--May 7. The defendant filed an affidavit showing that the premises described in the complaint were advertised for sale by the sheriff, by virtue of the

above judgment, without execution issued other than a certified copy of the judgment. He moved that the sale be stayed perpetually, except upon execution to be issued. Also, that the judgment be vacated or modified, by striking out all that part authorizing the sale of specific real property. This motion was argued and decided by the following order:

Ordered, that so much of the motion and order to show cause, heretofore made, as relates to the modification of the judgment, by striking out all that part thereof which describes particular real estate, be and is denied and discharged. And further ordered, that no sale under the judgment be made without the issuing of an execution.

The plaintiffs appealed from the last clause of this order, and the defendant appealed from the remainder, and from the judgment.

Waldo & Ody, for the plaintiffs.

Smith & Salomon, for the defendant.

By the Court, PAINE, J.

The principal question presented by this appeal is whether a party is entitled to a lien for building a fence. We think it clear that he would not be, if in order to sustain the lien, it was necessary to hold that a fence was a "building," within the meaning of that word, as used in chapter 153, Revised Statutes 1858, concerning the lien of mechanic's and others. We had occasion to place a construction upon that word, in the case of the *LaCrosse and Milwaukee Railroad Co. v. Vanderpool et al.*, ante 124, decided at this term, where we held that it did not include bridges, fences, and other erections of a similar character.

*2 But section 12 provides that "any person performing manual labor upon any land, timber or lumber," shall be entitled to a lien thereon, to be enforced according to the provisions of that chapter. The words "work done on land," are somewhat indefinite in their character, and it might be a matter of some difficulty to determine accurately all the kinds of labor for which they would give a lien. But without attempting to decide whether they have any further extent, we think they were certainly designed to include all labor done directly upon the land, for the purpose of preparing it for use as such. And fencing would seem to fall within this class. It is done upon the

11 Wis. 289, 1860 WL 4596 (Wis.), 78 Am.Dec. 706
(Cite as: 11 Wis. 289, 1860 WL 4596 (Wis.))

land, the fence becomes appurtenant to the land, and its object is to enable the land to be used or occupied as such. We think, therefore, that under this section, the plaintiffs were entitled to a lien.

We think, also, it was not waived by taking a note, the time of the payment not being extended beyond the year in which the party was required to commence his action. There have been authorities, we are aware, which have held the contrary; but we think the weight of authority is decidedly in favor of the position, that the taking of a note which does not extend the credit beyond the time in which the party is required to sue to maintain his lien, is not a waiver of it, and we can see no substantial reason why it should be.

The interest was properly included. The law provides a lien for the debt, and interest is an incident to the debt. It is true that in the absence of any agreement by the parties, the law would have fixed it at seven per cent. But the same law allows the parties by agreement to fix it at a higher rate not exceeding twelve. And having fixed it, the interest at such higher rate follows the debt, just as the legal rate would in the absence of an agreement. We think, therefore, that the judge properly denied that part of the defendant's motion, which asked that the judgment might be modified, by striking out all that part that described particular real estate.

The only remaining question is as to that part of the order forbidding a sale without the issuing of an execution. It is true that a sale of property against which a specific lien is adjudged under this law is more analogous to a sale on foreclosures than it is to an ordinary sale on an execution issued against the property generally. And it might be more consistent if the statute should provide for a similar proceeding. But it has not done so. On the contrary it provides expressly in section 9, that "execution may issue and be levied upon the premises subject to such lien, and sale thereof be made in the manner prescribed by law in ordinary cases." This seems to place it on a similar footing with a sale on execution upon a judgment where real estate has been attached. Section 59, chapter 131, provides that, in the latter case, the execution "may among other things, direct a sale of the interest of the defendant in the property at the time the lien accrued," which time should be specified in the judgment. It is true there is no express provision of the statute for the insertion of such a direction. But it does

provide that the sale may be on execution, and the very nature and object of the proceeding would seem to imply an authority to adapt the execution to the end provided for.

*3 Without saying, therefore, what would be the effect of a sale upon a certified copy of the judgment in such a case, without the issuing of any execution, in the absence of any order to the contrary by the court below, we certainly cannot in the face of this statute say that the court below erred in directing the sale to be on execution issued. We must therefore affirm the entire order, without costs.

Wis. 1860.
Bailey v. Hull
11 Wis. 289, 1860 WL 4596 (Wis.), 78 Am.Dec. 706

END OF DOCUMENT

C

Supreme Court of Wisconsin.
 PHOENIX MFG. CO.
 v.
 MCCORMICK HARVESTING MACH. CO.
 Oct. 15, 1901.

Appeal from circuit court, Chippewa county; A. J. Vinje, Judge.

Action by the Phoenix Manufacturing Company against the McCormick Harvesting Machine Company, impleaded with B. Barnhart and another. From a judgment in favor of defendant company, plaintiff appeals. Reversed.

West Headnotes

Mechanics' Liens 257 ↪ 212(1)257 Mechanics' Liens257VI Waiver of Right to Lien257k212 Taking Collateral Security

257k212(1) k. In General. Most Cited Cases Rev.St.1898, § 3317 (W.S.A. 289.05), declaring that the taking of a note or other evidence of indebtedness for any materials furnished shall not discharge the lien therefor thereby given, unless expressly received as payment therefor, and so specified therein, does not change the common-law rule that the taking of independent security waives the lien.

Mechanics' Liens 257 ↪ 213257 Mechanics' Liens257VI Waiver of Right to Lien257k213 k. Taking Mortgage on Same Property. Most Cited Cases

Where a party furnishes machinery to another, which is to be made a fixture, but before that time the buyer gives back a note and chattel mortgage thereon for an unpaid balance of the purchase price, the taking of the same does not manifest such an intention to waive the seller's right to a mechanic's lien on the land as will prevent his asserting the same when the machinery is annexed thereto.

Between December 29, 1899, and March 7, 1900, the plaintiff furnished to the defendant Barnhart machinery consisting of boiler, engine, sawmill machinery, etc., to be wrought into a sawmill to be built by said Barnhart upon certain real estate held by him under land contract from the defendant Matthes, amounting in all to \$470.03. Of this \$434.40 were delivered on December 29th, the remainder on and subsequent to January 17, 1900. On January 12th Barnhart executed a chattel mortgage upon "all that certain personal property, to wit," the description including the property thus sold by the plaintiff and other chattels, with the statement, "All clear, except \$234, given to Phoenix Manufacturing Company, Eau Claire, Wis., for purchase price." On January 17th Barnhart executed to the plaintiff a chattel mortgage for \$225 (the unpaid balance) upon "the following described goods, chattels, and personal property, to wit," describing specific articles theretofore received from plaintiff, securing a note for \$225, due May 17, 1900. On June 2, 1900, plaintiff duly filed his claim for lien for the balance then due, consisting of the \$225 balance due January 17th and \$35.63 thereafter charged. Barnhart and Matthes interposed no defense. The respondent McCormick Harvesting Machine Company set up the receipt of the note and chattel mortgage of January 17th both as payment and as waiver of the right to mechanic's lien. The court made no finding of fact as to the intent with which the note and mortgage were received, but found as a conclusion of law that it had the effect to waive the right to lien for the indebtedness thereby evidenced and secured, and therefore denied lien for \$225 of the claim, and awarded judgment of lien for the balance of \$35.63. From this judgment the plaintiff appeals.

*458 Teall & Thomas, for appellant.

A. H. Shoemaker, for respondent.

DODGE, J. (after stating the facts).

The single question raised upon this appeal is whether the plaintiff must, as matter of law, be held to have waived his right to a mechanic's lien upon the real estate into which was wrought the property sold by him for that purpose by the act of taking for the purchase price thereof a promissory note and a chattel

mortgage upon the specific chattels sold. The preponderance of authority doubtless is to the effect that a mechanic's lien will be deemed waived either by taking therefor a promissory note maturing not until after the statutory time fixed for enforcing the lien, or by taking independent security. Bailey v. Hull, 11 Wis. 289, 78 Am. Dec. 706; Schmidt v. Gilson, 14 Wis. 514; De Forest v. Holum, 38 Wis. 516, 524; Kneel. Mech. Liens, § 138 et seq.; Jones, Liens, §§ 1013, 1519, et seq.; Phil. Mech. Liens, §§ 273, 280. This rule has been modified by our statute, now section 3317, Rev. St. 1898, which denies any such effect to the taking of a note or other evidence of indebtedness. This statute, however, does not change the common-law rule as to the effect of taking independent security; nor has this court yet had occasion to decide as to the effect of such act, save in the one respect hereafter to be mentioned. The ultimate question is one of intent. If the parties, by their transaction, intended a waiver of the lien, no doubt such result is accomplished. If they intended that the lien should not be waived, but that the security should be taken merely as additional thereto, such intent will be given full effect by the courts. The significance, therefore, of such acts, is evidentiary only. They may serve to warrant the inference of an intent to waive in the absence of other satisfactory evidence on the subject. Bank v. Taylor (Tex. Civ. App.) 40 S. W. 876; Id., 91 Tex. 78, 40 S. W. 966; McKeen v. Haseltine, 46 Minn. 426, 49 N. W. 195; Kneel. Mech. Liens, § 138; De Forest v. Holum, 38 Wis. 525. It has been held by a very respectable array of authority--even by those courts which raise an implication of waiver from the taking of independent security, as also by our own--that a mere reservation of title by the vendor of personal property intended to be wrought into real estate as security for the payment of the purchase price does not raise any such implication for the reason that it is in no wise inconsistent with the intent to claim the statutory lien upon the real estate, so soon as the personal property sold shall have become so affixed thereto that the lien arises. Jones, Liens, § 1015; Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 720, 3 Sup. Ct. 594, 27 L. Ed. 1081; *459 Manufacturing Co. v. Smith (C. C.) 40 Fed. 339, 5 L. R. A. 231; Hooven, Owens & Rentschler Co. v. Featherstone (C. C.) 99 Fed. 180; Clark v. Moore, 64 Ill. 273, 279; Cooper v. Cleghorn, 50 Wis. 113, 6 N. W. 491. An interval of more or less duration may, and usually does, exist between the time when the property is sold and the time when it so becomes affixed. During that interval the seller is subject to various

perils, such as the sale to others by his vendee of the property, or the levy thereon by other creditors; and, while he may be entirely willing to extend credit upon the faith of the lien on real estate to which the annexation of the personal property will entitle him, he is not willing to rely solely upon the credit of the purchaser during that interval. Hence his act in holding the specific property sold as security for its purchase price may be ascribed wholly to his anxiety in the latter respect. Indeed, the very act of taking such security upon the property as chattels would seem to repudiate the idea that he was willing to rely on the personal responsibility of the purchaser, and therefore indicates that he does not intend to forego his lien upon real estate after the chattels sold had been wrought into it, and thereby lost their character as personal property, so that his chattel security thereon is or may be destroyed--a result which may well come, notwithstanding any agreement he might have with the purchaser of the chattels. Gunderson v. Swarthout, 104 Wis. 186, 190, 80 N. W. 465, 76 Am. St. Rep. 860; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698. No valid distinction is, nor, as we think, can be, suggested between an agreement reserving title in the vendor as security and one reconveying that title to him for the same purpose, namely, a chattel mortgage. The same object is sought to be accomplished in both instances, and the same inference of intent may legitimately be drawn from each. We are convinced that no intent or purpose can be ascribed to plaintiff to forego his statutory lien on the real estate when his chattels became annexed thereto merely because he took security upon those chattels while they still had that character. That would be to predicate a purpose of confidence or negligence upon acts of suspicion and vigilance. The circuit court erred in the conclusion of law that plaintiff had waived his right to mechanic's lien for any part of the purchase price of the machinery and materials furnished by him, and, as consequence, in denying him judgment of lien for the full amount found due, together with full costs as against the defendant McCormick Harvesting Machine Company. The amount of those costs can only be ascertained upon taxation in the circuit court, and for that reason we cannot fully correct the errors committed by modification of the judgment here.

Judgment reversed, and cause remanded, with directions to enter judgment for plaintiff for \$269.33, with interest from March 7, 1900, and for mechanic's lien upon the premises described in the complaint, together with full costs.

87 N.W. 458
111 Wis. 570, 87 N.W. 458
(Cite as: 111 Wis. 570, 87 N.W. 458)

Page 3

Wis. 1901.
Phoenix Mfg. Co. v. McCormick Harvesting Mach.
Co.
111 Wis. 570, 87 N.W. 458

END OF DOCUMENT

22 Mo. 137, 1855 WL 5365 (Mo.)
(Cite as: 22 Mo. 137, 1855 WL 5365 (Mo.))

C

Supreme Court of Missouri.
GORMAN, Plaintiff in Error,
v.
SAGNER AND OTHERS, Defendants in Error.
October Term, 1855.

*1 1. An acceptance, by one having a mechanic's lien upon a building, of a deed of trust upon the same, to secure the payment, at a future day, of promissory notes given for the debt which gave rise to the lien, amounts to a waiver of the lien.

Error to St. Louis Circuit Court.

Scire facias to enforce a mechanic's lien. Among other facts which it is unnecessary to state, it appeared upon the trial that the plaintiff, Gorman, had accepted from Sagner, for whom the work and labor that gave rise to the lien was done, and who was at that time owner of the building upon which the same was done, two promissory notes payable in ninety days and four months, and also a deed of trust upon said building to secure the payment of said notes. Billings, one of the defendants, claimed said building by purchase at sheriff's sale, under a judgment upon a mechanic's lien. On the trial, plaintiff offered to surrender the two notes of Sagner. The court ruled that plaintiff could not recover.

West Headnotes

Mechanics' Liens 257 ↪ 212(1)

257 Mechanics' Liens

257VI Waiver of Right to Lien

257k212 Taking Collateral Security

257k212(1) k. In General. Most Cited Cases

Taking an acceptance for a sum secured by a mechanic's lien, and a deed of trust of the property on which the lien exists, is a waiver of the lien.

Krum & Harding and Gray, for plaintiff in error.

1. The execution of the notes and the deed of trust to plaintiff by Sagner did not extinguish plaintiff's lien. It was not an equitable but legal lien, expressly given by statute, and would not be merged by a mortgage, deed

of trust, or judgment. Nothing but payment or an express release would discharge it. (14 J. R. 404; 2 Browne, 297; 14 S. & R. 32; 1 Hals. Ch. 485; 5 Watts, 118; 2 Miles, 214; 6 B. Mon. 67; 2 Wheat, 390.) 2. No injustice would be done to Billings by allowing plaintiff to recover; for plaintiff's lien was regularly filed in the Circuit Court, and suit was commenced on it, before Billings bought, and he bought therefore with full notice. He was bound to take notice of plaintiff's lien claim from the filing of it.
Knox & Kellogg, for respondent.

SCOTT, Judge, delivered the opinion of the court.

From the view we take of this case, it will not be necessary to determine the points of law raised on the trial; for if the plaintiff's lien was extinguished, it follows as a consequence that he can not recover.

The record raises the question whether the giving of notes, payable at a future day, and a deed of trust to secure their payment on the property on which the lien exists, is a waiver of the mechanic's lien for the debt secured by the notes and deed of trust. Did this question concern only the immediate parties to the deed, it would be a matter of little consequence how it was determined. But when the acts of individuals became the motive to the conduct of others, it is important that such acts should be made to bear their natural construction, so that deceit and imposition upon third persons may be prevented. When a mechanic's lien exists for a debt, if the giving of a deed of trust to secure the payment at a future day of notes executed for that debt, when that deed covers the identical property covered by the lien, is not a waiver of the lien, it would be difficult to say what act by implication of law would constitute such a waiver. The notes being for the debt secured by the mechanic's lien, and payable at a future day, that lien could not be enforced during the time the notes had to run; and on their becoming due, there being a power in the trustees to sell the premises for their payment, no end would be attained by holding on to the mechanic's lien. Why this should be done but for the purpose of discharging the lien and substituting another mode of satisfaction in its stead, it is difficult to imagine. Such conduct is entirely inconsistent with the idea of the continuance of the lien, and third persons who act upon the faith of

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(Cite as: 22 Mo. 137, 1855 WL 5365 (Mo.))

such conduct should not be deceived and disappointed of their just expectations. If either party to the transaction was overreached or was in error as to its consequences, that error can not be remedied at the expense of third persons.

*2 The cases cited by the plaintiff have been examined, and they do not contradict any thing here said. Although there may be some distinction between an equitable lien and one expressly given by law, yet there is nothing in the cases hostile to the idea that a lien conferred by statute may be extinguished by implication arising from the conduct of the parties. The strong feature in this case is, that the deed of trust was on the very property subject to the lien. Had it been on other property the case might have been different. Courts are inclined to regard securities as cumulative, when it can be done without violence to the rights of third persons.

From the view we have taken of the case, it can make no difference that the lien was filed when the defendant, Billings, became the purchaser. The deed of trust was also in existence.

The judgment will be affirmed, the other judges concurring.

Mo. 1855.
Gorman v. Sagner
22 Mo. 137, 1855 WL 5365 (Mo.)

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91 U.S. 257, 1 Otto 257, 1875 WL 17900 (U.S. Dist. Col.), 23 L. Ed. 321
(Cite as: 91 U.S. 257, 1875 WL 17900 (U.S. Dist. Col.))

C

Supreme Court of the United States
McMURRAY ET AL.
v.
BROWN.
October Term, 1875

****1** @Where a party furnished materials for the construction of a building, under an agreement that the owner thereof, by way of payment for them, would convey to him certain real estate at a stipulated price per foot, -*Held*, that on the refusal of the owner so to convey, or in lieu thereof to pay for such materials, the party is entitled to his lien, provided that in due time he gives the notice required by law.

West Headnotes

Mechanics' Liens 257 ↪73(5)257 Mechanics' Liens257II Right to Lien257II(C) Agreement or Consent of Owner257k73 Form and Requisites of Contract or

Consent

257k73(5) k. Stipulations as to Time of Performance and Payment. Most Cited Cases

One who furnishes materials for the construction of a building, under an agreement with the owner that the latter would convey to him certain real estate, at a stipulated price, in payment, is entitled to a lien upon the building, on giving the notice required by law, in case the owner refuses to convey the land or pay for the materials furnished.

Mechanics' Liens 257 ↪86257 Mechanics' Liens257II Right to Lien257II(D) Persons Entitled in General257k85 Contractors257k86 k. In General. Most Cited Cases

The words "any contract" as used in the Congressional act providing that any person who shall hereafter, by virtue of "any contract" with the owner of any building or with the agent of such owner, perform any labor, or furnish any materials, engines, or machinery

for the construction or repair of such building, shall, on filing the notice prescribed in the act, have a lien on the building and realty for labor done, or materials, engines, or machines furnished, when the amount shall exceed \$20, includes special contracts as well as contracts which arise by implication, unless the materialman is secured by a trust deed or mortgage or some other form of security repugnant to the theory that he ever intended to hold a lien under mechanics' lien law. 11 Stat. 376.

Mechanics' Liens 257 ↪93257 Mechanics' Liens257II Right to Lien257II(D) Persons Entitled in General257k85 Contractors257k93 k. Performance of Contract.Most Cited Cases

If labor has been performed or materials furnished, no matter in what manner the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third persons intervene before he gives the required notice. 11 Stat. 376.

Mechanics' Liens 257 ↪212(1)257 Mechanics' Liens257VI Waiver of Right to Lien257k212 Taking Collateral Security257k212(1) k. In General. Most Cited Cases

Contracts of a special character, such as to give a mortgage to a laborer or a mechanic, if duly executed under circumstances showing that the claim to a lien was not intended by the parties, may defeat such a claim, but a mere promise to give such a security if subsequently broken, will not impair such a right if the requisite notice is subsequently given before any right of a third person, as by attachment or conveyance, has become vested in the premises. 11 Stat. 376.

****2 APPEAL** from the Supreme Court of the District of Columbia.

This was an action to enforce a mechanics' lien under sect. 1 of the act of Congress approved Feb. 2, 1859,

91 U.S. 257, 1 Otto 257, 1875 WL 17900 (U.S. Dist. Col.), 23 L. Ed. 321
(Cite as: 91 U.S. 257, 1875 WL 17900 (U.S. Dist. Col.))

11 Stat. 376, which provides, 'That any person who shall hereafter, by virtue of any contract with the owner of any building, or with *258 the agent of such owner, perform any labor upon, or furnish any materials, engine, or machinery for the construction or repairing of, such building, shall, upon filing the notice prescribed in sect. 2 of this act, have a lien upon such building and the lot of ground upon which the same is situated for such labor done, or materials, engine, or machine furnished, when the amount shall exceed twenty dollars.'

The second section provides, 'That any person wishing to avail himself of this act, whether his claim be due or not, shall file in the office of the clerk of the Circuit Court of the District of Columbia at any time after the commencement of the said building, and within three months after the completion of such building or repairs, a notice of his intention to hold a lien upon the property declared by this act liable to such lien for the amount due or to become due to him, specifically setting forth the amount claimed. Upon his failure to do so, the lien shall be lost.'

Mrs. McMurray, one of the defendants, was indebted to the complainant in the sum of \$1,230.62 for materials furnished by him in the construction of two dwelling-houses on lots belonging to her in the city of Washington, under an agreement, that, upon the delivery of said materials, she would, in payment therefor, convey to him, at the rate of forty-five cents per square foot, certain real estate situate in said city. She subsequently refused to comply with the agreement, but promised to pay him the amount of his bill in cash.

No payment having been made, he, on the 13th of February, 1872, the houses then being uncompleted, gave the required notice of his intention to hold the property subject to his lien.

The court below rendered a decree in favor of the complainant; from which an appeal was taken to this court.

Mr. James S. Edwards for the appellants.

It is insisted as matter of law, that the complainant, upon his own showing, is not entitled to relief. 'Where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract alone for his security, and cannot resort

to the remedy which the mechanics' *259 lien law provides.' *Haley v. Prosser*, 8 W. & S. 133; *Grant v. Strong*, 18 Wall. 623.

The complainant must have been entitled to file his lien when the contract was made. He can do nothing afterwards to alter his position. *Hoatz v. Patterson*, 5 W. & S. 537.

**3 He clearly had no right to file his lien when the alleged agreement was made; for, by its terms, Mrs. McMurray was to convey a certain lot in exchange for the material furnished. His action for a breach of the contract is by a different proceeding. He has a remedy at law; no standing here.

Mr. Edwin L. Stanton for the appellee.

It is submitted that the facts show a contract within the statute; but the appellant insists 'that the complainant, upon his own showing, is not entitled to the relief he seeks, for the contract upon which he relies is a *special one*.' In support of this proposition, he cites the cases of *Haley v. Prosser*, 8 W. & S. 133; *Hoatz v. Patterson*, 5 id. 537; *Grant v. Strong*, 18 Wall. 623.

The two former decisions 'were a surprise to the profession, acted almost as a nullification of the law, and were followed by an act of the legislature extending the lien to all cases of contracts.' *Phill. on Mech. Liens*, 166, citing *Lay v. Millette*, 1 Phila. 513; *Russell v. Bell*, 44 Penn. 47.

Grant v. Strong in no manner supports the proposition, that, when a special contract has been made, the material-men or laborers have no lien.

The complainant, having no other security, was not deprived of his lien by reason of agreeing to accept land instead of money for his materials. There is no distinction in principle between an agreement to pay money or property which can possibly affect the remedy provided. *Phill. on Mech. Liens*, 182; *Campbell & Kennedy v. Scaife et al.*, 1 Phila. 187; *Haviland v. Pratt*, id. 364; *Hinchman v. Lybrand*, 14 S. & R. 32; *Reiley v. Ward*, 4 Iowa, 21.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Mechanics or other persons, who, by virtue of *any contract* with the owner of any building, or with the

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agent of such owner, have, since the 2d of February, 1859, performed labor, *260 exceeding the value of twenty dollars, upon such building, or have furnished materials, engine, or machinery exceeding that value, for the construction or repairing of such building, shall, upon filing the notice prescribed in the second section of the Lien Act of that date, have a lien upon such building, and the lot of ground upon which the same is situated, for such labor done, or materials, engine, or machinery furnished. 11 Stat. 376.

****4** Building materials of great value, such as bricks and lumber, were furnished by the complainant to the first-named respondent, by virtue of a verbal agreement, as he alleges, between him and the husband of the respondent, acting as her agent.

Service was made, and the respondent appeared, and by her answer admitted the averments of the first, second, fourth, and seventh paragraphs of the bill of complaint, but denied every other material allegation which it contains.

Proofs were taken; and, the parties having been fully heard, the judge, at special term, entered a decree that the complainant recover of the respondent the sum of twelve hundred and thirty dollars and sixty-two cents, with interest, as therein provided; and that the described real estate, -to wit, lots numbered thirty-six and thirty-seven, -together with the buildings and improvements thereon, be, and hereby are, subjected to the satisfaction of the complainant's demand.

Due appeal was taken by the respondent to the general term, where the decree of the special term was in all things affirmed; and the respondent appealed to this court.

Two other persons were named as respondents in the bill of complaint who never filed any answer, and are not parties to the decree, for the reason that no relief is sought against them, they having been joined as respondents merely for the purpose of discovery in respect to a prior lien held on the premises by the one named as trustee, to secure a debt due to the other.

Seasonable appearance was entered by the respondent, and she filed an answer; but, the answer having been lost, it is stipulated and agreed between the parties, that the answer, as before stated, admitted all the averments of the first, second, fourth, and seventh

paragraphs of the bill of complaint, and that it denied every other allegation of the complainant.

***261** Lumber and bricks were furnished by the complainant for two houses; and the evidence shows that the respondent owned both lots on which the houses were being constructed, and that she was represented throughout the transaction by her husband, who acted as her agent in constructing the houses. Nothing further need be remarked respecting the deed of trust of prior date, as it is admitted by stipulation that the deed is cancelled, and that the debt secured by it is discharged.

Due notice of the intention of the complainant to hold a lien upon the property, as required by the act of Congress, is admitted by the answer; nor is it necessary to discuss the question as to the agency of her husband in the transaction, as that also is admitted by the respondent. What the respondent denies is, that either she, or her agent in her behalf, ever made any such contract with the complainant as that set forth in the bill of complaint, or that the complainant ever furnished and delivered to her or her agent the building materials specified in the bill of particulars annexed to the bill of complaint, or that the materials were ever used by her or by her authority in the construction of the said houses.

****5** Lots thirty-six and thirty-seven belonged to the respondent, and the proof is that they adjoin each other. Prior to the alleged agreement with the complainant, the respondent entered into a contract with another party to build a two-story brick house for her on the lot first named, the contractor agreeing to build the house, and furnish, at his own proper cost and expense, all the materials necessary to complete the same in a workmanlike manner; for which the respondent agreed to pay to the contractor the sum of one thousand dollars, and at the same time to convey to him lot thirty-seven, and to pay the balance, amounting to twelve hundred dollars, in notes of fifty dollars each, payable monthly, at eight per cent interest, to be secured by a deed of trust on lot thirty-six, and the house to be built by the contractor, subject to a prior deed of trust on the same lot. By the record, it appears that the contract, though it bears date the 6th of June, 1871, was not actually executed until about the middle of July following, and that the contractor failed to fulfil the stipulations of the written contract.

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Perkins, the contractor, was without means or credit, and *262 possessed no capital whatever, except his skill as a builder; and the husband of the respondent, though he controlled the real estate standing in the name of his wife, was without any ready means at his command: consequently the materials for completing the house could not be obtained except by exchanging some of the real estate for the same. Detailed account is given, in the testimony, of the measures adopted by the parties to effect such an exchange of real estate for building materials; but it must suffice to say that all of the negotiations failed.

All of these attempts to procure building materials by exchanging real estate for the same took place before the contract for building the house was signed; and, at the close of those attempts, an interview occurred between the contractor under the written agreement and the complainant, when the latter informed the former that he would furnish lumber and bricks in exchange for lot thirty-seven, computing the value of the lot at forty-five cents per foot. Within two hours after the conversation, the former contractor reported the same to the husband of the respondent, and told him to have the deed of the lot made directly to the complainant, and proposed, at the same time, to divide between them the five cents per foot advance in price which the seller would receive beyond the consideration promised by the former contractor.

Abundant evidence is given to show that the offer of the complainant to take conveyance of the lot, and furnish the building materials as required, was accepted by the husband of the respondent; and that he, the agent, agreed that the lot should be conveyed to the complainant as proposed.

Pursuant to that arrangement, which appears to have been fairly and understandingly made, the complainant continued to deliver the required building materials; and the conduct of the husband of the respondent throughout the whole period the materials were furnished and delivered shows to the entire satisfaction of the court that the materials were furnished and delivered in pursuance of that understanding, and that he knew that the owner and furnisher of the same was parting with his property in the just and full expectation that the whole passed to the benefit of his wife under that arrangement. Evidence *263 to that effect is found in the testimony of several witnesses; and it is not going too far to say that there is nothing in the

record worthy of credit to contradict that theory.

**6 Part of the building materials furnished by the complainant before he made his contract with the respondent were used by the first contractor in the erection of a house on lot thirty-seven, which he designed for himself; but the title and ownership of that lot, as well as lot thirty-six, were in the respondent; and on the 1st of November, 1871, she took actual possession of the lot and the unfinished structure thereon which had been commenced by the former contractor, and ever after continued in the possession and control both of the lot and the building.

Nothing further was ever done by the contractor to complete these houses, and the record shows that the same were completed by another contractor employed by the same agent of the respondent. All of the materials for that purpose were furnished by the complainant; and the record also shows that he furnished all the materials used in constructing and completing both houses, except a small part of the bricks, worth perhaps one hundred dollars, which were purchased by the managing agent of the respondent.

Attempt is made by the respondent to controvert the proposition that her agent ever contracted with the complainant to furnish the building materials in question, and to take the conveyance of lot thirty-seven in payment for the same: but the evidence is so full and satisfactory to that effect, that it is not deemed necessary to add any thing to what has already been remarked upon the subject; nor is it of any importance that she had previously agreed to convey the lot to her former contractor, in case he completed the house for her on lot thirty-six, as he had failed to fulfil the contract, and she had dispossessed him of the premises and of the partly-erected house which he had commenced.

Materials for that purpose to a considerable amount had been furnished by the complainant during the progress of the work, while it was under the superintendence of the former contractor: but inasmuch as the title of both lots was all the time in the respondent, and she had lawfully resumed the possession of lot *264 thirty-seven on account of the failure of the contractor to complete the building on the other lot within the prescribed time, it was entirely competent for the respondent to make the new contract with the complainant, which it is proved she did make through her

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agent; and, having made the same, she is bound by its terms and conditions just the same as if it had been in writing.

Suppose the facts are so: still it is insisted by the respondent, as matter of law, that the complainant is not entitled to the relief he seeks, for the reason that the contract set up by him is a special contract. The theory is, that the materials having been furnished upon the verbal contract set out in the bill of complaint, that he, the complainant, should furnish the materials, and that she, the respondent, should convey lot thirty-seven to him in payment for the same, that that contract creates no lien, as the materials were furnished solely upon the faith of the special agreement; but the record shows that her agent who made the contract persuaded the complainant to wait for the conveyance until all the materials had been furnished, and that he, the agent, then refused to make the conveyance. Instead of doing as he agreed, having received an offer of fifteen cents per foot for the lot more than the complainant was to allow, he, the agent, promised to pay the complainant the money for the materials, but failed to make good his promise in that regard.

****7** Both houses were completed; and the proof is, that the complainant furnished all the lumber and nearly all the bricks for the purpose, and that he has received no payment for the materials. On the other hand, it appears that the respondent has sold one of the houses for six thousand dollars, and that she and her husband were living in the other.

Other defences failing, her proposition now is, that, where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract *alone* for his security, and that he cannot resort to the remedy which the lien law provides. Support to that proposition cannot be derived from any thing contained in the act of Congress passed to enforce mechanics' liens, unless the words of the first section ***265** of the act are shorn of their usual and ordinary import and signification.

Persons who perform labor upon, or furnish materials, &c., for, the construction or repairing of a building, by *virtue of any contract* with the owner of the same, or his agent, have a right to the benefit of the lien if he files the notice prescribed by the second section of the act. Certainly the words *any contract* are sufficiently

comprehensive to include special contracts as well as contracts which arise by implication, unless the materialman is secured by a deed of trust or mortgage, or in some other form of security repugnant to the theory that he ever intended 'to hold a lien under the mechanics' lien law.'

Special reference is made by the respondent to two decided cases in Pennsylvania in support of her proposition that the lien law does not extend to special contracts. *Hoatz v. Patterson*, 5 W. & S. 538; *Haley v. Prosser*, 8 id. 133. Unexplained, it may be admitted that those cases do afford support to the proposition that the State lien law to which they refer did not extend to the debt of a material-man, arising from the sale and delivery of building materials, if furnished under a special contract; but those decisions were never satisfactory to the legal profession of that State, and it is believed are not regarded as safe precedents even in the jurisdiction where they were made. Instead of that, the legislature of the State, on the 16th of April, 1860, passed a declaratory law, which enacts that the true intent and meaning of the provisions of the prior act extend to and embrace claims for labor done and materials furnished and used in erecting any house or other building which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same, and that the provisions of the former 'act shall be so construed.' Since that time, it has been held by the courts of that State to the effect that special contracts, as well as implied, are within the true intent and meaning of the original lien law of the State. *Russell v. Bell*, 44 Penn. 36-54; *Reiley v. Ward*, 4 Greene (Iowa), 21.

****8** Cases may arise, undoubtedly, where the rights and responsibilities of the parties are so completely defined by the contract, that neither party is at liberty to claim any thing beyond ***266** the terms of the contract, if the contract is in all respects fulfilled. Consequently, lien laws do not in general create a lien in favor of a material-man who has accepted in full a different security at the time the contract or agreement was made. Examples of the kind, such as a trust-deed or mortgage, may be mentioned, which are regarded as a species of security inconsistent with the idea of a mechanics' lien upon the same land for the same debt. *Grant v. Strong*, 18 Wall. 623; Phill. on Mech. Liens, sect. 117.

Such a security is regarded as inconsistent with the

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intent of the parties that a mechanics' lien should be claimed by the party furnishing building materials, as the owner may obligate himself to pay in money, land, or any specific article of property; but, if he does not fulfil his contract by paying in the manner stipulated, the mechanic is entitled to his lien. Reiley v. Ward, 4 Greene, 22.

If the labor has been performed or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third persons intervene before he gives the required notice.

Contracts of a special character, such as to give a mortgage to the laborer or mechanic, if duly executed under circumstances showing that the claim to a lien was not intended by the parties, may defeat such a claim; but a mere promise to give such a security, if subsequently broken, will not impair such a right if the requisite notice is given before any right of a third party, as by attachment or conveyance, has become vested in the premises. Laches in that behalf may impair such a right, and it is one which the claimant may waive. Phill. on Mech. Liens, sects. 117, 272.

Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis, that, if the stipulated labor is performed or the promised materials are furnished, the laborer or material-man is entitled to the lien which the law affords, provided he gives the required notice *267 within the specified time. 11 Stat. 376; Phill. on Mech. Liens, sect. 118.

Viewed in any light, it is clear that there is no error in the record.

Decree affirmed.

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C

Supreme Court of the United States
GRANT
v.
STRONG.
October Term, 1873

****1** A builder's lien held not to have attached where a builder took a real security for payment of the work which he was to do, and afterwards, the work being all done, gave it up and took a mere note.

West Headnotes

Mechanics' Liens 257 53

257 Mechanics' Liens
257II Right to Lien
257II(B) Services Rendered and Materials
Furnished
257k53 k. Reliance on Credit of Building or
Property. Most Cited Cases
A builder took real security for payment of the work
which he was to do, and, the work being all done, gave
it up and took a mere note. Held, that no builder's lien
attached.

Mechanics' Liens 257 209

257 Mechanics' Liens
257VI Waiver of Right to Lien
257k209 k. Implied Waiver in General. Most
Cited Cases

Mechanics' Liens 257 230

257 Mechanics' Liens
257VIII Extinguishment
257k230 k. Extinguishment or Loss in Gener-
al. Most Cited Cases
The question whether a mechanic's lien is obtained or
is displaced when it once attaches is largely a matter of
intention to be inferred from the acts of the parties and
all the surrounding circumstances.

Mechanics' Liens 257 211(1)

257 Mechanics' Liens
257VI Waiver of Right to Lien
257k211 Taking or Transfer of Bill or Note
257k211(1) k. In General. Most Cited Cases

Mechanics' Liens 257 212(1)

257 Mechanics' Liens
257VI Waiver of Right to Lien
257k212 Taking Collateral Security
257k212(1) k. In General. Most Cited Cases
Written agreement between owner and contractor
under which contractor took security for payment of
work which contractor agreed to perform and under
which contractor gave up the security and took a note,
were construable as showing intention on part of the
contractor to rely on security for payment of his work
other than a mechanic's lien, and as creating no such
lien.

Mechanics' Liens 257 236

257 Mechanics' Liens
257IX Release
257k236 k. In General. Most Cited Cases
When a mechanic's lien has attached, the taking of a
note as negotiable security for the lien does not of
itself operate as a release of the lien.

****2** APPEAL from the Supreme Court of the District
of Columbia.

Strong filed a bill in equity in the court below against
Grant to establish a mechanic's lien for the sum of
\$1547. There was no denial that work was done, nor
that it was of the value alleged, nor that it was of that
character for which liens are allowed by the laws of
the District.

The question was whether, under all the circumstances
of the case, such a lien ever attached.

The material facts were these:

On the 14th day of October, 1869, the parties made an

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agreement that Strong should do the brickwork on sixteen houses which Grant was building. The price of the work per thousand bricks was agreed upon, and that Strong should take one of the houses in payment for his work, the price of which was also fixed; and this contract was reduced to writing. A conveyance was made by Grant of the lot which Strong was to have, and the deed duly acknowledged and recorded and placed in the hands on Enoch Totten, as an escrow, to be delivered to Strong when the work was completed. During the progress of the work dissatisfaction arose between the parties after the larger part of it had been done, and on the 27th of November, a new written contract was made. This, after reciting the former agreement, says that it is agreed that Strong shall finish all the brickwork up to the first floor joists without delay. The price was changed, but the old agreement was referred to for the mode of measurement. It is then said that the same is to be paid for in Grant's negotiable note, payable within three months from the date of the completion of the work, and then the agreement of October 14th shall be cancelled and declared *624 null and void, and of no effect, and the escrow in the hands of Totten be delivered up to Grant, otherwise said agreement to remain in full force and effect.

Another paper, signed by both parties, dated January 1st, 1870, recites the former agreements, and that the work had been finished and measured, and that Grant had given his promissory note for the amount, according to the contract of November 27th; and that, therefore, the escrow in Totten's hands is declared null and void, and is to be delivered to Grant by Totten.

A good deal of evidence was found in the record as to what was said and done by the parties in the matter, and the court below decreed that a lien existed. From that decree this appeal was taken.

Messrs. W. A. Meloy and F. Miller, for the appellant, referred to *Barrows v. Baughman*,^{FN1} *Haley v. Prosser*,^{FN2} and numerous other cases, to show that a builder's lien cannot exist where the agreement provides for another sort of security.

FN1 9 Michigan, 213.

FN2 8 Watts & Sergeant, 133.

**3 *Mr. W. A. Cook, contra,* cited *The Kimball*,^{FN3} and

many cases, arguing from them, and on principle, that a lien is never extinguished by a mere note, except on the plainest evidence of an intention to extinguish it; but on the contrary, when a lien clearly exists, that a note is always regarded as but cumulative.

FN3 3 Wallace, 37.

Mr. Justice MILLER delivered the opinion of the court.

We have much argument in the case as to the effect of the note as a negotiable security operating as a release of the mechanic's lien. We think this has but little pertinency to the case. We admit that when a lien has once attached, the taking of such a note does not of itself operate as a release. The question whether a lien is obtained, or is displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all the surrounding *625 circumstances. In the case before us, much conflicting testimony as to what was said and done by the parties, is found in the record. We need not consider this, for in our view the decision of the case must rest on the written agreements we have mentioned, and from them we are forced to the conclusion that the appellee always relied wholly upon other security than a mechanic's lien for his pay, which he deemed sufficient, and which he voluntarily agreed to surrender.

It is very clear that under the first contract, the one under which the larger part of the work was done, he was to take his pay, not in money, but in the lot on which one of the houses was built; and that to secure the completion by Grant of the sale when the work was done, the deed was made and placed in the hands of Totten. Under these circumstances no lien could accrue for the work on that, or on the other buildings. When the second contract of November 27th was made, Strong did not give up this security, but still retained and relied on it, and it was made a part of the new contract, that the escrow should remain in the hands of Totten, and should be in full force until the work was completed, measured, and the sum due on it paid by the promissory note of Grant. Now with this security in Totten's hands during all the time the work was going on, looked to and relied upon by Strong, how can it be said that Strong relied upon a mechanic's lien, or that Grant intended in addition to that deed for one lot to allow Strong to obtain a lien upon all the others? And so much reliance was placed on this escrow by Strong, that only after all was settled, the

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work measured and paid for, as the parties had stipulated by Grant's note, did Strong sign the order for the delivery to Grant of the deed. During this time all the facts repel the idea of a lien.

We do not think that the giving up of the escrow, and the taking of the note in its place, according to the terms of an agreement previously made, and which obviously did not look to a mechanic's lien as part of the transaction, would look a lien where none existed before.

****4** In short, we are of opinion that these agreements show an ***626** acceptance and reliance by Strong on another and very different security for the payment for his work, inconsistent with the idea of a mechanic's lien, and that no such lien ever attached in the case.

DECREE REVERSED, with directions to

DISMISS THE BILL.

Mr. Justice SWAYNE dissenting.

U.S.

Grant v. Strong

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via legal messenger to:

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DATED the 10th day of December, 2010 at Everett,
Washington.



ANGELA K. WRIGHT