THE LAW OF PROPERTY

SUPPLEMENTAL MATERIALS

Class 06

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CONCISE HORNBOOKS

PRINCIPLES OF Property Law

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Chapter 3

GIFTS, INCLUDING BANK ACCOUNTS

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SUMMARY

§ 3.1 Introductory Principles

1. A gift is a voluntary transfer of property by one person to another without consideration or compensation. The person who makes the gift is called the "donor" and the person to whom the gift is made is called the "donee."

2. A gift is a present transfer of an interest in property. The gifted interest can be either a present interest[1] or a future interest.[2] There is no necessity that the gift be of the entire interest in the property.

3. If the transfer is intended only to be effective in the future and to create no rights in another at the present time, it is a mere promise to make a gift and unenforceable in the absence of consideration.

4. A gift made in a person's will[3] does not take effect when the will is signed. It takes effect when the person dies unless

1. A present interest is an interest in property that is presently possessory by the holder of the interest. For example, a life estate is a present interest.

2. A future interest is an interest in property that is not presently possessory. It is an interest that will or may become possessory in the future. For example, if O gifts land to A for life, and then to B, B's interest is future since B's right to possession is postponed until A dies. See generally, Chapters 5 & 6.

3. A will is a legal document executed by a person who is called a testator.

between the time the will was signed and the person's death the will was revoked. Gifts made in wills are called bequests, legacies, or devises. The recipient of the gift in the will has no property right in the subject matter of the bequest until the testator dies.

5. A gift of property during the donor's lifetime is valid only if there was intent, delivery and acceptance.

§ 3.2 Intent to Make a Gift

Donative intent is determined primarily by the words of the donor. In doubtful cases, however, the court, in determining whether there was intent, will consider the surrounding circumstances, the relationship of the parties, the size of the gift in relation to the total amount of the donor's property, and the conduct of the donor towards the property after the purported gift.

§ 3.3 Delivery

1. Delivery is essential for a gift. The delivery requirement serves a ritualistic, evidentiary, and protective function.

2. The delivery must divest the donor of dominion and control over the property.

3. What constitutes delivery depends upon the circumstances. Ordinarily the delivery requirement is met if the donor turns over possession of the subject of the gift to the donee. This is sometimes called "manual delivery."

4. If the subject matter of a gift cannot reasonably be delivered manually, or the circumstances do not permit it, a symbolic or constructive delivery may suffice. In either of this cases, something, other than the subject matter of the gift, is delivered to the donee.

5. A delivery is symbolic when something is transferred to the donee in place of the subject matter of the gift; a constructive delivery is the transfer to the donee of the means of obtaining possession and control of the gifted property.

6. If the subject matter of the gift is already in the hands of the donee, delivery is not necessary.

7. A delivery to a third person on behalf of the donee is a sufficient delivery to satisfy the delivery requirement if the third person is acting as a trustee for the donee[4] and not an agent of the

Generally, to be valid a will must be signed by a testator and witnessed by at least two witnesses. Each state sets forth a number of formalities that must be followed by the testator and the witnesses for the will to be validly executed.

4. While some courts may refer to the third person as an agent of the donee, use of the word "trustee" is more appropriate. A person acts as an agent for another as the result of a consensual agreement to that affect between the agent and the principal. In this gift situ-

donor. Whether the person to whom the property is transferred is an agent of the donor or a trustee for the donee depends upon the facts and circumstances of the case.

§ 3.4 Acceptance

Acceptance by the donee is required for a valid gift. The donee may refuse to accept since one cannot have property thrust upon him in an inter vivos transaction against his will. However, acceptance generally is presumed if the gift is beneficial to the donee.

§ 3.5 Inter Vivos or Causa Mortis

1. A gift may be either inter vivos or *causa mortis.*

2. An inter vivos gift is an irrevocable transfer of property made to the donee during the donor's lifetime.

3. A gift *causa mortis* is one made in contemplation of the donor's imminent death. It is revocable by the donor at any time before the donor dies and is automatically revoked if the donor does not die from the anticipated peril. The gift *causa mortis* becomes absolute on the donor's death from the anticipated peril if the donee survives the donor and the donor had not revoked the gift.

§ 3.6 Joint Bank Accounts

1. Joint and survivorship bank accounts when effectively created permit either party to exercise control over the deposited funds during their lifetimes. At the death of one party, the entire balance belongs to the survivor.

2. Joint and survivorship bank accounts frequently are used for the purpose of directing the devolution of funds on the death of the depositor. The effectiveness of these accounts to accomplish that purpose where one of the parties is the sole depositor depends, in part, upon the governing state law and the facts as to the particular joint bank account.

3. The validity of a joint bank account to pass title to property to the surviving joint tenant by means that are essentially testamentary without complying with the Statute of Wills is supported by either the contract or gift theory.

   a. In a jurisdiction following the contract theory of joint bank accounts, the survivor is entitled to the proceeds of the account simply because the contract between the deceased depositor and the bank so provides.

ation, the donee may have no knowledge of the transfer to the third person or even the third person's identity. Thus, it is inappropriate to characterize the third person as the donee's agent.

b. In a gift theory jurisdiction, the noncontributing survivor is entitled to the account if he can establish that a gift was effected by which he acquired an interest in the account when it was created. The requirements of donative intent, delivery, and acceptance must be proved. The subject matter of the gift is an interest in the account during the joint lives of the depositors and not the entire proceeds of the account. The finding of a gift is facilitated when both parties make deposits and withdrawals during the joint lives. Any inference of a gift is rebutted by a finding that the account was created in both names merely for the convenience of the principal depositor and that there was no intent to make a gift.

§ 3.7 Tentative Trust Accounts and POD Accounts

1. A bank account in the name of the depositor "as trustee for another" is a valid bank account trust so that on the death of the depositor the proceeds of the account belong to the named beneficiary. These tentative trusts are revocable at any time during the life of the depositor and are commonly referred to as "Totten trusts." Typically, assets in a Totten trust are subject to the claims of the depositor's creditors during his life and at his death. However, in some states creditors of the estate must first be paid with assets from the deceased depositor's probate estate.

2. POD accounts are bank accounts made payable on death to one other than the depositor (a so-called "POD account"). These tend to function much like Totten trusts.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 3.2 Intent to Make a Gift

PROBLEM 3.1: F wrote his son S a letter stating: "I give you my Y painting for your 21st birthday but I am retaining possession of the painting until I die." At F's death the executor of F's estate claims that the painting is properly an asset of F's estate. S claims the painting is his. Who is correct.[5]

Applicable Law: In order to make a valid gift there must an intent to transfer an interest in the gifted property to the donee at the present time. The interest can be an absolute interest or less than an absolute interest such as either a life estate or a future interest. Gifts of future interest are valid.

5. Gruen v. Gruen, 68 N.Y.2d 48, 505 N.Y.S.2d 849, 496 N.E.2d 869 (1986).

Answer and Analysis

S is correct. In order to make a valid gift there must be intent, delivery and acceptance. The intent must be to make a gift of some interest in the gifted property at the present time, whether that interest be a present interest or a future interest. A donor may gift a future interest and retain the present interest in the gifted property. Here, for example, F's letter reflects his intent to gift a future interest in the painting to S, while retaining a life estate in the property for himself. The gift of the remainder interest is immediate and vests title in the donee subject only to the retained life estate in the donor.

Since the donor intends to retain possession of the painting until his death, actual delivery of the painting to S would be inappropriate and inconsistent with the nature of the gifted interest, a remainder interest in the painting. The best delivery under the circumstances would be a symbolic delivery such as the letter F sent to S.

PROBLEM 3.2: F, an elderly man but in good health, endorsed a stock certificate over to his daughter, D, placed the stock certificate in an envelope, and delivered the envelope to B, saying that it "should be delivered to D in case of my death." Sometime later, F died and the stock certificate was delivered by B to D. The administrator of F's estate brings an action to recover the stock or its value from D. May the administrator succeed?[6]

Applicable Law: An inter vivos or *causa mortis* gift may be made by delivery to a third party for the donee. If the directions to the third party are to deliver the subject matter to the donee on the death of the donor, meaning whenever and however such death should occur, and the donor presently intends to divest himself of ownership and control of the gifted interest, then, regardless of how the contingency is expressed, the transaction constitutes a valid inter vivos gift. An interest vests presently in the donee even though possession and enjoyment are postponed. The relationship is similar to that of fee simple ownership and executory interest, or life estate and remainder.

Answer and Analysis

The answer is no but a contrary answer is possible. The facts suggest a somewhat ambiguous transaction, and the result depends upon how the court construes F's intent. Since F was suffering no ill health and was not facing an immediate peril, it is clear that no

6. Innes v. Potter, 130 Minn. 320, 153 N.W. 604 (1915).

gift *causa mortis* was intended. The general awareness of the inevitability of death is insufficient to support a gift *causa mortis*.

The delivery requirement of a gift is satisfied by delivery to a third person for the benefit of, or for further delivery to, the donee if the donor intends the third party to act as trustee for the donee. Thus, the only question, and the crucial one in this case, is the intent of the donor at the time he delivered the stock certificate to B.

The directions were to deliver the stock to D in case of F's death. Did F mean that D was to get the stock and all interests therein only at the death of F and nothing before? If so, the transaction is testamentary and ineffective because of noncompliance with the Statute of Wills. The direction to deliver "in case of death" sounds as if death is a condition precedent, and hence the transfer should be ineffective. Death, however, is inevitable, and the only contingency is time. If the directions were to deliver "on my death" instead of "in case of my death," the transaction would not be testamentary since death is certain to occur. The difference is explained in the next paragraph, but in the meantime, it may be noted that an ordinary layperson is just as likely to use the expression "in case of death" as use "upon my death," or "when I die."

In the event that a donor transfers personal property to a third person to be delivered to a donee on the death of the donor, meaning whenever and however the donor may die, then the donor has effectively divested himself of sufficient dominion and control over the property. The inevitability of death makes it certain that the full title eventually will vest in the donee. The situation is analogous to delivery of deeds to real estate upon the donor's death and can be construed as vesting presently a future interest in the donee. The relationship can be categorized as that of a life estate in the donor with a future interest (called a "remainder") in the donee. Title to the property passes to the donee but the donee's possession and enjoyment is postponed until the donor dies. In the case of a gift of stock, therefore, the fact that the donor collects dividends during his life, or votes the stock, is immaterial since these are rights that are essentially equivalent to the possession of real estate. There is a valid gift which takes effect immediately on transfer of the subject matter to the third party, and on the donor's later death, the future interest previously vested in the donee becomes possessory.

Thus, in this problem, if the donor's intent can be construed as meaning that the donee is to get the stock on the death of the donor, no matter when or how that event occurs, then the gift is complete on the delivery of the stock to B, and a future interest

vests at once in the donee. The fact that the donor said "in case I die'" instead of "when I die" should not be too significant because of a lack of appreciation of the legal differentiation. Further, natural conceit or reluctance to accept the inevitability of death may lead to the use of a contingent expression when in fact such inevitability is recognized. After delivery to B, F in fact exercised no dominion or control over the stock other than that which was consistent with the reservation of a life estate. Therefore, F made a valid gift of a future interest to D and the administrator of F's estate cannot recover the stock as the stock is properly D's and not an asset of F's estate which would have been the case if the gift was ineffective.

§ *3.3 Delivery*

PROBLEM 3.3: O desired to give D 100 bearer bonds of the X Corporation which O kept in her safe deposit box at the local bank. Since it was Sunday and O could not get to her box, she gave D the key to the box and told D to go to the box on Monday and take the bonds. D takes the bonds from the safe deposit box on Monday. One week later O dies and the executor of O's estate seeks to recover the bonds from D. Who wins?

Applicable Law: The delivery requirement can be satisfied by a delivery of the subject matter of the gift to the donee or by a delivery of something else to the donee which either symbolizes the gift (symbolic delivery) or gives the donee a means to gain access to the gift (constructive delivery). Generally, neither symbolic nor constructive delivery can be used if the subject matter of the gift can be conveniently delivered to the donee. The delivery requirement serves a ritualistic, evidentiary, and protective function. The ritual of delivery reenforces to the donor the seriousness and finality of the act of transferring possession of property to another and protects the donor from the consequence of inadvised oral statements. Delivery also serves as objective evidence that a transfer has actually occurred.

Answer and Analysis

D wins. The executor of O's estate can win only if the gift was ineffective. If that were true, then D, who is in possession of the bonds, would be required to turn them over to the executor to be distributed to the persons entitled to O's estate. On the other hand, if the gift were effective, D could keep the bonds.

In order to make a valid gift there must be intent, delivery, and acceptance. There appears to be no dispute that O intended to give the bonds to D. Rather, the issue is whether there has been a sufficient delivery under the facts and circumstances. The facts

indicate that it was not possible for O to retrieve the bonds and give them to D on Sunday. Therefore, if there was a good delivery it had to be a constructive delivery evidenced by the delivery of the keys to the safe deposit box to D. These keys give D the means to acquire possession of the bonds. This delivery should be sufficient.

Delivery of only the keys to a safe deposit box might not be a sufficient delivery of the bonds in the box if D could obtain entry to the box only with both a key and the signature of O on a access card, and D had never taken possession of the bonds prior to O's death.

PROBLEM 3.4: O, in accordance with her custom of the past five years, desired to give her son, S, and her daughter, D, a Christmas gift of $1,000,000. In order to make this gift O decided to transfer to each child 8,000 shares of Stock X worth $992,000 and $8,000 in cash. O's 16,000 shares of Stock X were kept in S's safe deposit box; S had a general power of attorney from O as to all the stock in S's vault.

After O, vacationing in California, had communicated to S her desire to make these gifts, S's bookkeeper in New York wrote to S, by then also in California, suggesting a plan whereby 8,000 shares of Stock X, together with $8,000 in cash would be credited to the accounts of each S and D. O approved the plan and then authorized S to send a telegram "Credit 8,000 shares of Stock X to each of S and D as indicated in your letter." The bookkeeper credited the accounts of S and D accordingly. Each entry indicated that the transfer as to the stock had already taken place. O died prior to the transfer of any cash to S and D.

Under state law, death taxes are payable on decedent's property owned at death. Did O own the 16,000 shares of Stock X and the $16,000 of cash at the time of her death?[7]

Applicable Law: In order to make a valid gift of personal property there must be a donative intent, delivery, and acceptance. Acceptance is generally presumed if the gift is beneficial. Manual delivery of the subject matter of the gift is not required

7. See In re Mills' Estate, 172 App. Div. 530, 158 N.Y.S. 1100 (1916), affirmed 219 N.Y. 642, 114 N.E. 1072 (1916) (the donor, living in California, instructed his son in New York to present $1,000,000 each to himself and to the donor's daughter, of which $16,000 was cash and the rest in stock, the court held there was sufficient delivery of the stock to the son to support an inter vivos gift to the son as well as a sufficient delivery of the stock to the son for the benefit of the daughter to support an inter vivos gift to the daughter, given that the son had general power of attorney).Compare, Bickford v. Mattocks, 95 Me. 547, 50 A. 894 (1901) (Donor delivered the property to his attorney as the agent of the donor for the purpose of delivering it to the donee but attorney neglected to deliver the property to the donee, the delivery to the donor's agent was not a delivery to complete the gift to the donee).

in all circumstances and delivery can be satisfied by a constructive or symbolic delivery. Further, where actual transfer of possession would serve no useful purpose, or where it would be impossible or a vain and useless act, it is not required. Thus, if the intended donee is already in possession of the subject matter of the gift as bailee of the donor, no further delivery is necessary. In this case, release to the bailee with the proper donative intent is sufficient.

Delivery can be made to a third party for the benefit of a donee if the donor intends to constitute the third party as trustee for the donee. If the intended trustee is already in possession of the subject matter of the gift because, for example, he'd previously been designated as the donor's bailee, no further delivery would be required. In this case, re-characterizing the bailee's role as trustee for the intended donee is sufficient.

Answer and Analysis

O did not own the 16,000 shares of Stock X at her death but did own the $16,000 of cash.

The traditional rule is that for a valid gift there must be both a donative intent to make a gift and a valid delivery of the subject matter of the gift. Delivery of a deed of gift, however, will satisfy the requirements of a delivery of the subject matter itself. The policy behind the rule requiring delivery is to protect alleged donors from fraudulent claims of gifts based only on parol evidence.

The requirement of delivery to the extent it entails an actual transfer of the personal property has been considerably diluted over the years. The nature of the delivery requirement depends in a large measure upon the circumstances of each case. Where actual transfer of possession is either impossible or ridiculous, various substitutes have been recognized as sufficient. For example, if the subject matter of the gift is already in the possession of the intended donee, as here where the donee is a bailee of the donor, then the law does not require the donee to redeliver the items to the donor to have him transfer them back to the donee. Under such circumstances, the requirement of delivery is obviated, and all that is necessary is donative intent. Under these circumstances, the requirement of delivery is usually satisfied by a clearly expressed intent that the title, or a portion thereof, be presently transferred to the donee.

In this problem, S was in possession as bailee of all the stock of his mother, the donor, O. The stock certificates were physically located in New York, but the donor and S, one of the donees, were in California. As to S, physical delivery was not only unnecessary

but actually impossible. Therefore, as to his gift, any further delivery is unnecessary and all that is required is a complete manifestation of intent to transfer title at the present time. This was done by the telegram, and further, the book entries were actually made indicating that a transfer had taken place. Accordingly, there was a completed gift as to S.

The validity of the gift to D, however, rests upon additional principles. Delivery need not be made to the donee; it can be made to a third party for the donee's benefit. If there is an absolute transfer of possession to a third party to act as trustee for the donee, the fact that the donee is unaware of the transfer is immaterial. In the absence of evidence to the contrary, acceptance by the donee is presumed. In gifts to third parties for donees, what is required is a transfer of possession of the subject matter of the gift, and a clear manifestation of intent to make a gift. In this problem S is already in possession of the stock of the donor. Thus, in common with the analysis concerning the gift to S, any further delivery at this time is not only unnecessary but also impossible. All that is required is a clear manifestation of intent to release to S the beneficial interest in the stock for the benefit of the donee, D. This was clearly done as evidenced by the telegram and by the book entries before O's death. Therefore, there was a completed gift of the stock to both S and D.

The cash transfers needed to complete the respective gifts are a different matter. No entries were made upon O's books showing actual payment of this amount until after her death, and the telegram manifesting an intent to make a present gift only referred specifically to the stock. Thus, there is insufficient evidence to show an inter vivos gift of the cash.

Since state law taxes only decedent's property owned at death, the cash but not the stock is subject to death taxes.

PROBLEM 3.5: M was admitted to the hospital to undergo major surgery. Before entering the operating room M wrote a note to F stating that cash would be found in a various places in their home and this money, together with two bank books, were for F. The letter concluded as follows:

> God be with you. Please look out for yourself. I cannot stay with you. My will is in the office of my Lawyer. There you will find out everything.

Your loving wife,
M

M placed the note in the night table beside her hospital bed and asked a nurse to tell F about it. Later in the day while

M was still unconscious, F came to the hospital and was told about the note. F read the note, went home, found the cash and bank books and has retained them ever since. M died nine days later. Under her will, M left F $1 and the balance of her estate to her children and grandchildren. In the suit by her personal representatives F claims ownership of the cash and bank books on a gift *causa mortis.* The trial court held there was no gift. On appeal, what result?[8]

Applicable Law: In order to make a valid gift, inter vivos or *causa mortis,* there must be intent, delivery, and acceptance. Many courts carefully scrutinize *causa mortis* gifts because if valid they circumvent the policies underlying the Statute of Wills that transfers that are not complete until death should be evidenced by a writing that is witnessed by at least two witnesses.

Answer and Analysis

A gift *causa mortis* is essentially a testamentary act and, as such, represents an invasion of the policies underlying the Statute of Wills designed to avoid fraudulent transfers. In some states they are not favored. Accordingly, in such states transactions that might be classified as gifts *causa mortis* must be closely scrutinized.

The first issue is whether there had been sufficient delivery. One must consider whether the note was a sufficient delivery of the cash and bank books or whether manual delivery of these items was required. While some courts would hold that the delivery of the note was a sufficient symbolic delivery of the cash and bankbooks under these facts (neither money or bankbooks immediately available to M), in *Foster,* the court concluded that the delivery of the note was not sufficient to complete the gift. In the case of the bank books the court concluded that delivery of the passbooks rather than the notes would be required. Said the court: "In the case of a savings account, where obviously there can be no actual delivery, delivery of the passbook or other indicia of title is required." Then the court concluded: "Here there was no delivery of any kind whatsoever. We have already noted the requirement so amply established in our cases ... of 'actual, unequivocal and complete delivery during the lifetime of the donor, wholly divesting her of the possession, dominion, and control' of the property. This requirement is satisfied only by the *donor,* which calls for an affirmative act on her part, not by the mere taking of possession of the property by the donee."[9] This analysis is suspect. First, to suggest there can be no actual delivery of a bank account is wrong. The

8. Foster v. Reiss, 18 N.J. 41, 112 A.2d 553 (1955).

9. Id. at 50–51, 112 A.2d at 559.

donor can take the donee to the bank, withdraw the money and hand it to the donee. Courts have long recognized that as an alternative there can be a constructive delivery of the account by delivering the passbook to the donee, and the majority recognizes this. If delivery of the passbook can be a constructive delivery, why cannot a letter have the same effect?

Further the court rejected the notion that the note was an authorization for the husband to take delivery of the property consummating the delivery. The court reasoned that the note failed as an authorization "since at the time he took the note from the drawer the decedent was under ether and according to the findings of the trial court unable to transact business until the time of her death."[10] The agent's authority terminates, the court concluded, when the principal has no capacity. This rationale is peculiar. M's intent was not to make F her agent, it was to make him her donee.

The court also rejected the notion that the donee already had possession of the gift property making delivery unnecessary because the gift property was in the family home. Even if delivery is dispensed with where the donee has possession of the property, the court stated that in this case the house was decedent's property and although the husband resided in the house he did not know the property was in the house or its exact location.

The court then noted that the intent requirement is separate from the delivery requirement. Strangely, the court stated: "Although the writing established her donative intent at the time it was written, it does not fulfill the requirement of delivery of the property, which is a separate and distinct requirement for a gift *causa mortis*."[11] Thus, the court was willing to achieve an intent-defeating result by stringently construing the requirement of delivery in the context of a gift *causa mortis*.

The dissent decried the result. "Although the honesty of the husband's claims is conceded and justice fairly cries out for the fulfillment of his wife's wishes, the majority opinion ... holds that the absence of direct physical delivery of the donated articles requires that the gift be stricken down." The dissenters then cited Chief Justice Stone's article[12] that the reasons for the delivery requirement, while perhaps historically justified, are no longer true and "courts should evidence a tendency to accept other evidence in lieu of delivery as corroborative of the donative intent." It characterizes the delivery requirement as widely entrenched and perhaps advisable as "a protective device to insure deliberate and unequivocal conduct by the donor and elimination of questionable or fraudu-

10. Id. at 54–55, 112 A.2d at 561.

11. Id. at 52, 112 A.2d at 560.

12. Stone, Delivery in Gifts of Personal Property, 20 Col. L. Rev. 196 (1920).

lent claims." Nonetheless, it should not be so strictly applied under the facts of this case where the donative intent is clear. Furthermore, given the setting in which M apparently decided to make the gift to F, M's only reasonable alternative was to write F a note since neither the cash nor the bank books were in M's possession or readily available to her.

§ 3.5 Inter Vivos or Causa Mortis

PROBLEM 3.6: Prior to undergoing an operation for the removal of a life threatening tumor, D delivered to X various pieces of jewelry with instructions to give them to named donees "in the event of my death from the operation." After making an incision, the surgeon decided that removal of the tumor was too dangerous and then sewed up D's wound. One week later D, who was aware that the tumor was not removed, was released from the hospital. Thereafter, D died from the tumor. Between the time D was released and the time she died, D expressed a continuing desire that the named donees should receive the items of jewelry that still remained in X's possession. Although advised by her attorney that the gifts were probably no longer valid, D did nothing to change the nature of the deposit or to make a will bequeathing the jewelry either to the intended donees or to anybody else. After D's death, the personal representative of D's estate brought an action to recover the items of jewelry from X. The administrator claimed that the gifts of jewelry were ineffective and therefore the jewelry was properly an asset of D's estate. Is the administrator correct?

Applicable Law: Gifts are divided into two principal categories: inter vivos and *causa mortis.* A gift *causa mortis* is a gift made in contemplation of death. It is automatically revoked if the donor recovers from the contemplated peril. It can also be revoked by the donor at any time prior to the donor's death. Most courts construe gifts *causa mortis* as taking effect immediately but subject to an implied condition subsequent that the gift is revoked if the donor recovers. Other courts disregard or minimize formal distinctions dependent upon the manner of expression when a donor purports to make a gift *causa mortis,* since the expression "if I die," expressing a condition precedent, is more likely to be used than the more appropriate words expressing a condition subsequent. A gift *causa mortis* made in contemplation of death from an operation is revoked automatically if the operation is not performed even though death comes later from the underlying cause.

Answer and Analysis

The personal representative can recover the property from X. Gifts are divided into two principal categories: inter vivos and *causa mortis*. A gift inter vivos is absolute and unconditional. It takes effect at the time of delivery and cannot be revoked by the donor. A gift *causa mortis* is made in contemplation or apprehension of death as a result of an existing peril. It is not absolute but conditional upon the donor's death. It also is revocable by the donor at any time before the donor's death and is revoked automatically if the donor recovers from the peril. For a valid gift *causa mortis*, the peril of the death that is contemplated must be immediate and specific. A concern for the normal vicissitudes of life is not sufficient.

A fully effectuated *causa mortis* gift is dependent or conditioned on the death of the donor. Some courts require that the condition be a condition subsequent rather than a condition precedent in order to meet the general requirement that a valid gift requires an intent to transfer an interest in the property presently and not merely in the future. Whether the condition is precedent or subsequent, however, has engendered considerable verbal gymnastics and subtle rationalizations. The difficulty with construing the gift as being subject to the condition precedent of the donor's death is that if the gift doesn't take effect until the death of the donor, then it is too late for the donor to make a gift in this manner since the donor can only direct the transmission of property after death by means of a will. This would require compliance with the state's Statute of Wills.

Most jurisdictions construe gifts *causa mortis* as transferring title presently but subject to revocation on recovery by the donor or earlier if the donor changes her mind. Under this rationale, the gift becomes absolute on removal of the conditions subsequent. In effect, the gift operates thus: "This item is yours, take it now and enjoy it, but if I recover from this peril, I want it back." The difficulty of requiring the donor's intent to be expressed in this manner is that most donors would not be aware of the distinction between conditions precedent and subsequent, and in fact most donors would most likely express the gift in terms of a condition precedent, e. g., "I want you to have this if I die." Thus, some courts may utilize the condition subsequent analysis but liberally construe statements accompanying the transfer of the subject matter of the gift as evidencing a gift *causa mortis* although grammatically they may in fact be expressed in terms of a condition precedent. Some courts simply repudiate the distinction. Here, the facts support an intent by D to make a gift *causa mortis* by delivering property to a third party acting as trustee for the intended donees.

The donor wanted the items to be delivered to the donees "in the event of my death from the operation." The facts show that the donor did not die from the operation and the donor made a sufficient recovery to return home from the hospital. D, in fact, died from the tumor. The immediate peril, as evidenced by D's statement to X, that motivated the gifts was the *operation.* Since D did not die on the operating table, the gift was revoked. The donor did have time after returning home to draft a will or to make an inter vivos gift of the jewelry to the intended donees, neither of which D did. Therefore, D's personal representative may recover the items since the gift was revoked.

If D had stated to X at the time D delivered the jewelry to X: "give these to the donees in the event of my death," the donees might have a strong argument that the peril D feared was death from the tumor, not merely death during the operation. This argument would support the donees because D did die from the tumor even though it was after D had been released from the hospital.

It also might be argued that D's later statements to X that the donees should receive the property resulted in an inter vivos gift to them. This assumes X is the trustee for D's intended donees.

Suppose the donor dies of a different peril from the one that motivated the gift. For example, what if D died in the hospital from pneumonia contracted after the operation and while D was recovering. If D intended to make a gift only if she died during the operation, then the gift was automatically revoked when the operation ended. On the other hand, the phrase "in the event of my death from the operation" may be a surrogate for "if I don't come home from the hospital." As so construed, the gift would not be revoked.[13]

> **PROBLEM 3.7:** On December 23, 1998, A suffered a severe and disabling heart attack from which A remained hospitalized for approximately two months. On March 23, 1999, A gave a note for $10,000 to a trusted employee, B. On the note, A penned in the following words, "Only Good In Case of Death." Due to A's incapacity, A could only return to work on a part time basis. A died on October 16, 2001 of "acute pulmonary edema, arteriosclerotic heart disease and chronic congestive heart failure." After A died the administrator of A's estate refused to pay B the $10,000. B sued the administrator claiming there was a gift *causa mortis*. Can B succeed?[14]

13. See Ridden v. Thrall, 125 N.Y. 572, 26 N.E. 627 (1891).

14. Fendley v. Laster, 260 Ark. 370, 538 S.W.2d 555 (1976).

Applicable Law: A gift *causa mortis* is a gift made in contemplation of death. It is automatically revoked if the donor recovers from the contemplated peril.

Answer and Analysis

B cannot succeed. There is no difficulty in finding that the subject matter of the gift has been delivered by the donor to the donee at a time when the donor was under the apprehension of death from some existing disease; both requirements of a valid gift *causa mortis*. The difficulty comes with the requirement that the donor must not recover from his infirmity. A finally died of his heart ailment but more than two years after delivery of the gift to B. The fact that A did leave the hospital and showed some interest in his business is at least convincing evidence that A "recovered" from the depth of the disease that caused A to be concerned about chances of prolonged life. B's claim against the estate must fail.

§ *3.6 Joint Bank Accounts*

PROBLEM 3.8: A opened a savings account in the names of "A and B as joint tenants with the right of survivorship." Both A and B signed the signature cards which provided that the funds in the account were payable to "A or B or to the survivor." A kept possession of the passbook. All deposits to, and withdrawals from, the account were made by A. After A's death, B withdrew all the funds from the account, and A's administrator then brought an action against B to recover the funds withdrawn. May the administrator recover?

Applicable Law: Joint and survivorship bank accounts, when created by only one of the depositors contributing the funds, are analyzed either on the basis of a contract or gift theory, depending upon the jurisdiction. According to the contract theory, the depositors and the bank stand in a contractual relationship and either depositor or the survivor, after the death of one of the parties, is entitled to deposit or withdraw funds, including the entire amount. Under this approach, the survivor is entitled to the funds remaining simply on the basis of the contract.

Under the gift theory, the non-contributing survivor is entitled to the account only if the contributing depositor did in fact intend to make an inter vivos gift of an interest in the account to the other. The requirements of donative intent, delivery, and acceptance must be satisfied. The subject matter of the gift is not of the entire funds in the account but simply of a co-interest therein.

Answer and Analysis

No. Joint bank accounts are in common usage and are the frequent subject of litigation. When one of the parties makes all of the deposits and exercises complete control over the account during his lifetime, the courts follow either one of two theories in determining the rights of the survivor after the death of the cotenant who made the deposits. These theories are the contract theory and the gift theory.

The contract theory is predicated on the proposition that a bank deposit constitutes the bank a debtor. Then, when the depositor orders the bank to pay himself or another upon the order of either party, and secures the signature of the second party evidencing an assent to the arrangement and notifies him of the completed transaction,[15] there is created in the second party by contract a joint interest in the account equal to his own. Thus, under this theory, B is entitled to the funds simply because this was the contract with the bank.

Under the gift theory, B, the survivor, gets the funds only if a valid gift was made. The requisites of donative intent, delivery, and acceptance must be shown. Acceptance causes little difficulty because of the presumption of accepting beneficial gifts and because of the signing of the signature card. Donative intent and delivery are more difficult problems. In order to sustain a gift, it is not necessary that the subject matter of the gift be the entire bank account or that the entire funds be delivered to the donee. In the joint bank account case, the intended gift and the subject matter thereof are an interest in the account, not the account itself. Delivery is sufficient if there is a vesting of an equal right to control, that is, to deposit and withdraw funds from the account. Thus, under the gift theory, B is entitled to the funds if A intended to vest in him presently an interest in the account, and if A did in fact give him an equal right of control. In cases such as this where no dispute arose until after the death of the donor-depositor, the form of the account constitutes prima facie evidence of the gift. Thus, if no rebuttal testimony is introduced, B will be allowed to keep the funds. If, however, it is shown that the alleged donee never made any deposits or withdrawals during the lifetime of the donor, that the donor did not intend him to have any such control, that the only purpose of the account was to pass it to the donee on the donor's death, that until then the funds were to be regarded solely as those of the donor, and that the account was put in both

15. Some courts have held that it is not necessary for the survivor to have signed the signature cards. See In re Stamets' Estate, 260 Iowa 93, 148 N.W.2d 468 (1967). A non-signing co-owner of the account could be viewed as a third-party beneficiary of the contract between the depositor and the bank. See also, In re Estate of Michaels, 26 Wis.2d 382, 132 N.W.2d 557 (1965).

names for the convenience of A, then no present gift was created and the administrator would be entitled to the funds. The degree of liberality with which the courts construe these accounts varies considerably. In this problem, however, since there are few, if any, facts to rebut the inference of a gift arising from the joint account, the decision should be in favor of B. That B did not in fact make any deposits or withdrawals is not conclusive that B had no right to do so.

§ 3.7 *Tentative Trust Accounts*

PROBLEM 3.9: A opened two savings accounts. Each passbook listed the ownership as "A in trust for B." A exercised full control over both accounts, making additional deposits and withdrawals whenever A desired. The money withdrawn was used by A for personal uses and A made no effort to account to B for any funds in the account. At one time one account had a balance of $10,000 but at A's death this account was closed. The other account had a balance of $15,000 at A's death. None of these funds had apparently come from the closed account. At the death of A, both B and A's administrator claimed the right to the proceeds of the remaining account and B also claimed the $10,000 that had been in the closed account. (1) As between the administrator and B, who is entitled to the proceeds of the active account? (2) May B recover from A's estate the $10,000 which was in the closed account?

Applicable Law: A bank account in the name of "A in trust for B" is valid as a tentative or revocable trust with the named beneficiary being entitled to the proceeds in the account, if any, upon the depositor's death. During the depositor's lifetime, however, the account is revocable by the depositor. This revocation can be evidenced merely by withdrawing funds from the account.

Answers and Analysis

B is entitled to the funds in the active account but may not recover the $10,000 from A's estate. Bank accounts in the name of the depositor in trust for another person ("A in trust for B") are widely used and are designed for the convenience of the depositor who controls the account during his or her lifetime. By naming a beneficiary the depositor also is able to designate who shall receive the funds in the account at the depositor's death. These accounts are sometimes called "poor persons' wills." They are, in effect, tentative trusts or trusts in which the depositor reserves the right to revoke. Clearly, no irrevocable trust is intended, but on the other hand, there is an intent that the beneficiary of the account has an interest in the account from the time that the account is opened. It

is thus a revocable trust with the grantor-depositor reserving complete control and power of revocation in whole or in part. Thus, when A withdraws money from an account or closes it entirely, A is in effect revoking the trust either pro tanto or completely. Until revoked, however, the beneficiary of the trust has a beneficial interest in the account similar to such an interest in a more formally prepared trust in which the settlor reserves the power to revoke.

Accordingly, the unrevoked account in trust for B became absolute on the death of A. At A's death A no longer had the power to revoke the account. Therefore, the entire beneficial and legal interest in the account vested in B. This is consistent with A's intent and unless some strong public policy should invalidate this type of arrangement, B should get the account. With respect to the closed account, however, B is not entitled to recover. The trust was only tentative or revocable, and A revoked this trust by closing the account. Therefore, B is not entitled to recover.[16]

Although B is entitled to the funds in the active account at A's death, B may take subject to the claims of A's creditors, if any. As a general rule, the funds on deposit in a Totten trust are liable for payment of the debts of the deceased depositor once the assets of the deceased depositor's estate have been exhausted.[17] Assets of the deceased depositor's estate include only property capable of passing by the deceased's will or by intestacy and do not include assets passing by reason of a Totten or tentative bank account trust.[18]

16. See Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904): "[a] deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act.... "; see also Uniform Probate Code § 6-104. Such tentative trust accounts are often called "Totten trusts."

17. See Unif. Prob. Code § 6-107.

18. See Brown on Personal Property 174-1888 (3d ed., Rauschenbush, 1975).

EXAMPLES & EXPLANATIONS

Property

Second Edition

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6

Gifts

Gifts play an important role in life and law. We saw in Chapter 5 that a donee — the recipient of a gift — cannot be a bona fide or good-faith purchaser because she is not a "purchaser." Similarly, you will learn later in the course that the real estate recording acts do not protect donees the way they protect good-faith purchasers and creditors. Much of the complicated material in future interests soon to be discussed in the course begins with a gift or a bequest.

A ***gift*** is a noncontractual, gratuitous transfer of property. It is made without legal consideration. If there is consideration, the law of gifts does not apply. A transfer for consideration is a sale, and the rules of contracts apply.

There are two types of gifts: first, a gift between living persons is called an ***inter vivos gift;*** a gift made on account of a donor's impending death is called a ***gift causa mortis.*** A transfer of property by will after a person's death is called a ***devise*** or ***bequest*** and not a gift.

Inter Vivos Gifts

An ***inter vivos gift*** is a gift between living persons. For an inter vivos gift to be effective between the giver (the donor) and the recipient (the donee), the donee must show three things: first, a clear and convincing intent in the donor to transfer the object to the donee (donative intent); second, the donor in most cases must actually deliver the object to the donee; and third, the donee must accept the object. Thus, the donor's donative ***intent,*** plus physical ***delivery*** and ***acceptance***, are the three elements required for a valid gift.

(a) Donative Intent

For a gift to be effective the donor must intend to make the gift. Mere delivery is not a gift. The delivery may have been part of a loan, or a bailment, for example. Courts are suspicious of claimed gifts, and will scrutinize the facts of a transfer to ensure that the donor had the requisite intent. The donee

bears the burden of proof to show that the donor had the donative intent. The evidentiary standard for the showing of donative intent — i.e., clear and convincing evidence — is high. Often vague terms evidence a transfer of an object, as when someone says, "Take charge of this." It should be, and will be, up to the alleged donee to show that a gift was intended. Thus the law's suspicion about gifts is soundly grounded in a skeptic's view that a person would not freely give away property.

Intent to make a gift and delivery usually occur simultaneously, but not always. If someone lends a book to a friend, but later discovers that he has two copies of it and says that the friend can keep the loaned copy, the donative gift exists; proving that a gift of the book was intended will be difficult, however, its delivery and the intent to deliver it being shown to exist at different times. Certainly the lender's statement that the friend can keep the book is evidence of a donative intent; while evidence after the time of delivery is admissible, it is not as convincing as evidence of intent at the time of delivery. On the other hand, when a donor says, "I'll give you the book next week," and does so, the evidence of intent shows an upcoming delivery, and acceptance that next week by the donee will complete the gift transaction. The latter transaction has completed the elements of the gift in a typical, nonsuspicious chain of events. In a third transaction, when the donor says, "I'll give the book to you, friend, if I find out that I have a second copy of it," there is no gift until there has been a delivery. A gift cannot be subject to a condition precedent (an act or event that must occur or not occur before the gift will be made or become effective).

Note that if the donor makes a gift of a book because he thought he had two copies of it and discovers after delivering the book that he did ***not*** have two copies of it, he cannot demand the book back. The gift was complete — and irrevocable — when the gift was accepted by the donee.

(b) Delivery

Delivery is a necessary element of a gift. Delivery usually is the actual physical delivery of the object. An agreement that a donor will transfer, and another receive, an object is insufficient for a delivery. A promise to make a gift is unenforceable by the donee, and the donor can decide not to make the gift (revoke the promise) anytime before delivery. The law otherwise would be akin to saying that, as a matter of contract law, an offer and acceptance without consideration constitute an enforceable contract. Similarly, a gift may be accomplished by the donor's first executing a deed of gift expressing a present intent to give, and then delivering the deed to the donee; the gift is complete once the deed is delivered, but not before.

When physical delivery is impossible (the chattel is large or heavy) or impractical (it is in the hands of a third party, or in a bailee's possession),

physical delivery is not required and courts have shown a willingness to recognize other types of delivery. In such circumstances, the delivery element may be satisfied by a symbolic delivery. A ***symbolic delivery*** occurs when the thing delivered stands in the place of the property. Symbolic delivery occurs, for example, when a picture of a large chest of drawers is delivered to the donee; that would be a symbolic delivery of the chest. Another example involves the delivery of one item, along with a written inventory of similar items: The one in such a situation stands for the many. Symbolic delivery in these situations might better be termed either a representational (in the former situation) or a representative (in the latter) delivery. Generally, a sale deed or deed of gift stands for the thing itself; likewise, a corporate share certificate stands for the interest in the entity.

A delivery may also be ***constructive***. The property itself is not transferred, but something giving access to and control over it is. Examples involve giving the keys to an automobile or the keys to a safe deposit box to the donee. Here a constructive delivery gives the donee access, or the means of exercising possession and control, over the chattel. Other examples of this type of delivery occur when the donee is already in possession, or has possession in some other capacity, as a bailee or employee. Actual delivery would be a fruitless action, one that most persons would not think worth taking.

Still another example of constructive delivery involves lost chattel, the donor giving instructions to the donee as to how to go about finding it; upon its recovery by the donee, the chattel has been constructively delivered. Likewise, a donor's revealing the hiding place of chattel is also its constructive delivery.

Intent and delivery are separate elements. Clear evidence of the donor's intention is needed to complete the gift. Although physical delivery is evidence of the intent to make the gift, delivery is only one bit of evidence and not a conclusive substitute for evidence of intent: It is too easy to obtain the keys to a chest, or a car, and claim it was the subject of a gift. This is particularly true when the donor is in ill health, is dying, or is otherwise unable to put his or her hands on the chattel at the moment. Constructive delivery only emphasizes that the rationale for the concept of delivery is to have the donor relinquish possession and control over the chattel.

(c) *Acceptance*

For a completed gift, the recipient must accept the gift. Although a donee may refuse or reject a gift, acceptance in most situations is presumed from the benefit received by the donee; thus, acceptance has not been the subject of much reported litigation. Without evidence to show rejection, there is no rejection. The presumption of acceptance is a rebuttable one. No one is required to accept whatever "gift" someone else thinks would be to his or her benefit. No benefit or property may be forced on the unwilling.

Gifts Causa Mortis

A ***gift causa mortis*** is made when the donor has an apprehension or expectation of his or her own impending death and delivers the chattel with the intention that control over the subject of the gift takes effect immediately, but becomes absolute only upon the donor's death. Jewelry is often the subject of gifts causa mortis.

The expectation of death required is subjective; an objective or reasonable expectation is not required. Whether the expectation of death is present is a question of fact. The illness, disease, or peril prompting the expectation must be objectively present, however. A threatened assassination, minor surgery, a perilous journey, and a perilous enterprise undertaken voluntarily have all traditionally been regarded as insufficient.

The donor must have a present intention to deliver absolute ownership of the property in the future, at death; an attempt by the donor to reserve control over the property until death invalidates this type of gift. Such an attempt would result in a gift (if recognized) that was subject to a condition precedent, and invalid as such. There is a presumption that a gift made while death is impending is a gift causa mortis, rather than a gift inter vivos. This presumption is rebuttable by proof of the donor's intention to part unconditionally over the property given.

The title of the donee causa mortis is not absolute until the donor is dead. Death must result from the same illness, disease, or peril producing the donor's initial expectation, not some other illness or event, although it is not necessary that the sole cause of the donor's death be the same as that causing the donor's expectation of death.

Meanwhile, the donee is the donor's bailee. Gifts causa mortis are revocable. In some jurisdictions, revocation is automatic if and when the donor recovers from the illness, accident, or other event that made death seem likely. Recovery is seen as a determinable event.[1] In some jurisdictions, however, a gift causa mortis is revoked only if the donor affirmatively revokes the gift after recovery. An automatically revoked gift causa mortis belongs to the donor as though no gift causa mortis had ever been made. The gift is not thereafter revived by a relapse or another, equally grave, illness. To illustrate, if just before heart surgery Mother gives her wedding ring to her youngest daughter at her bedside, and Mother survives surgery, Mother gets her wedding ring back. If Mother a month later dies from a heart attack or any other reason, Mother's wedding ring passes according to her will, and her youngest daughter has no superior claim to the ring because Mother at one time made the ring the subject of a gift causa mortis.

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1. A determinable event (or condition subsequent) automatically terminates the donee's ownership and returns title to the donor without any action on the donor's part.

A person cannot make a gift causa mortis to escape the claims of creditors. Gifts causa mortis are subject to the claims of creditors when other assets of the donor are insufficient to repay the debts. Whether such gifts are subject to marital rights is generally a matter for state probate codes and statutes — and generalizations about this subject are hazardous. Real estate may not be the subject of a gift causa mortis.

The gift causa mortis is the functional equivalent of a devise (a transfer of property by will). Every state has enacted elaborate requirements in a Statute of Wills that must be fulfilled to give effect to a will or testamentary transfer. The gift causa mortis is thus an extraordinary power and, being in derogation of the jurisdiction's Statute of Wills, is not favored. A high standard of proof, that of clear and convincing evidence, is generally required to uphold such gifts. Courts are also likely to strictly construe statutes and cases upholding such gifts. As with inter vivos gifts, the judicial rationale for strictly construing the elements of this type of gift has to do with the evidentiary problems associated with them. In the instance of gifts causa mortis, however, the evidentiary problems are acute because the donor is dead.

EXAMPLES

Dresser Delivery

1. Is the giving of the keys to a dresser a symbolic or a constructive delivery?

Revocation and Donative Intent

2. Owen executes an otherwise valid deed of gift. The deed contains a power to revoke. Does the power to revoke indicate a lack of donative intent sufficient to invalidate the gift?

Christmas Carol

3. (a) In September Lee hands Peter a signed paper promising that Lee will give Peter 10,000 shares of Profit Corporation as a Christmas present. Lee dies in November, devising all his "stock and bonds" to Carol. Carol and Peter both claim the Profit Corporation stock. Who gets the stock?

(b) In September Lee transfers 10,000 shares of Profit Corporation stock to Peter, with the qualification that Lee (the grantor) will receive all dividends paid by Profit Corporation on the stock on or before Christmas. Lee dies in November, devising all his "stock and bonds" to Carol. Carol and Peter both claim the Profit Corporation stock. Who gets the stock?

The Uncashed Check

4. Odysseus writes and signs a check to Don, drawn on Odysseus' checking account, but dies before Don cashes it. Does Don have a right to cash the check?

Suicide and the Gift Causa Mortis

5. Ollie, contemplating suicide because of recent business and personal problems, executes a deed of gift of the contents of her safe deposit box to Del. Is suicide a life-threatening illness justifying a gift causa mortis?

War

6. Fred is a member of the armed forces and is about to go to war. Is he contemplating death in the way required to make a gift causa mortis?

EXPLANATIONS

Dresser Delivery

1. Giving the keys may be a symbolic delivery of the piece of furniture, but could be a constructive delivery of the contents of the dresser, found in the drawers. These two concepts are easily confused, but both are useful means for courts to uphold a gift when there is sufficient evidence of donative intent but no actual delivery.

Revocation and Donative Intent

2. No. If the deed adequately indicates a present donative intent — i.e., an intent at the time Owen delivered the deed to make a gift — the gift is good. The donee owns the property. Owen made the gift with a qualification, and retains the right to demand that the property be returned to him. The gift was complete and belongs to the donee until and unless Owen affirmatively revokes.

Some courts refuse to enforce revocation clauses as a matter of public policy. See dicta in Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986) ("Once the gift is made it is irrevocable . . . and the donor is not an owner.") As you will learn, revocable trusts are common. A revocable trust arises when a grantor transfers property to a person (the trustee) to hold for the benefit of a third party (the beneficiary). The grantor can retain the right to revoke the trust and get the property back. If the revocable trust is permissible, the revocable gift should be permissible. The only reason to differentiate between the two is that revocation rights in a trust usually are in writing, whereas many gifts are oral.

Christmas Carol

3. (a) Carol wins. Lee's promise is unenforceable because Peter gave no consideration. When Lee died, he was the legal owner and the stock passed according to his will.

(b) Peter keeps the stock. The gift in September was a present gift, with a present intent to make a gift, delivery, and acceptance. Lee's retaining the income for four months does not make the gift incomplete.

The Uncashed Check

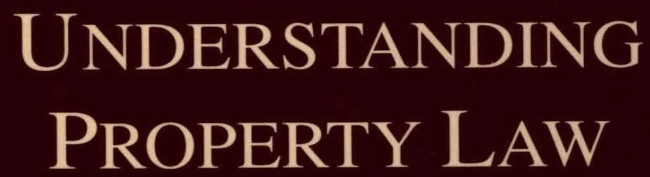
4. No. The donor could have stopped payment on the check any time before it was cashed, and the donor's death revoked the authority of the bank to cash it, so the gift was incomplete because of the donor's retention of a power to revoke the gift. The donor could have cashed a check and given the donee the money. The check is not a deed of gift, and the power to cash it is not the same as a gift. See Woo v. Smart, 442 S.E.2d 690 (Va. 1994) (holding that the delivery of a check is an incomplete assignment of the funds on account).

Suicide and the Gift Causa Mortis

5. A person contemplating suicide has traditionally not been regarded as being in imminent peril of death sufficient to justify an exception to the Statute of Wills, so older authorities would answer this query in the negative. A suicide is traditionally an insane act. A few more recent cases reason that mental illness is just as pressing a backdrop for a gift causa mortis as physical illness; they hold that the contemplation of a suicide should be treated as one in contemplation of death. Scherer v. Hyland, 380 A.2d 696 (N.J. 1977). The analogy between a person facing major surgery (being allowed to make a gift causa mortis) and a suicide makes it difficult to deny a suicide donative power. The recent view is that some mental illnesses (e.g., depression) are accompanied by an irresistible urge to commit suicide, putting a person in contemplation of death. More generally, it might be said that if a jurisdiction recognizes (as most do) that a suicide may have testamentary capacity, a suicide's will becoming valid on that account, it should also be possible for a suicide to make a gift causa mortis.

War

6. A person about to go to war is not facing an imminent peril giving rise to an expectation of death. There are, however, English cases to the contrary.



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Chapter 5

GIFTS OF PERSONAL PROPERTY

SYNOPSIS

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§ 5.05 Restrictions on Donor's Autonomy

§ 5.01 Gifts in Context

The right to transfer property by gift is uniformly recognized as a fundamental right.[1] From the utilitarian perspective, legal recognition of a gift provides mutual benefits to both parties, thus optimizing social happiness; the donor derives altruistic satisfaction, while the donee receives the value of the item.[2]

This chapter examines gifts of personal property—both tangible personal property such as artwork, jewelry, and antiques, and intangible personal property such as copyrights and choses in action—made during the donor's lifetime; Chapter 28 examines the transfer of property at death. The rules governing gifts—once remarkably rigid—have been in transition for several decades, torn between the conflicting policies of certainty and donor autonomy. Concerned that judicial enforcement of the traditional "delivery" requirement may frustrate a donor's intent, modern courts increasingly

[1] *See* Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 U. Fla. L. Rev. 295 (1992).

[2] *See generally* Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. Legal Stud. 411 (1977); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. Legal Stud. 401 (1991).

ignore or circumvent this standard. Under this emerging view, clear evidence of the donor's intent obviates the need for formal delivery.

§ 5.02 What Is a Gift?

A gift is a voluntary, immediate transfer of property without consideration from one person (the *donor*) to another person (the *donee*). Consider a hypothetical party celebrating B's birthday. Each party guest (donor) voluntarily presents a colorfully-wrapped package (gift) to B (donee), without receiving payment or other consideration; the transfer of ownership rights in the package to B is immediately effective. A transfer that takes effect in the future is not a valid gift; for example, a transfer effective upon the donor's death is governed by the law of wills, not the law of gifts.

The law recognizes two categories of gifts. The *gift inter vivos* is an ordinary gift made by one living person to another, as in the birthday example above; once made, it is irrevocable. The *gift causa mortis* is also a present gift between living persons, but one made in anticipation of the donor's imminent death; thus, if the donor survives the anticipated peril, the gift is revoked.

One scholar suggests that the boundaries between gift and two other types of property transfers—larceny (involuntary transfer without consideration) and sale (voluntary transfer for consideration)—may overlap.[3] If elderly R "gives" a valuable jewel to her young friend E, was the jewel given in exchange for the services that E has provided in caring for R, and hence more like a sale than a true gift? Or was this transfer the product of undue influence that E exerted over R, and thus like larceny?

§ 5.03 Gifts Inter Vivos

[A] General Rule

There are three requirements for a valid gift inter vivos:

(1) *intent* (the donor must intend to make an immediate gift);

(2) *delivery* (the donor must deliver the gift); and

(3) *acceptance* (the donee must accept the gift).

In practice, intent is usually the most important element. The requirement of delivery is controversial; while still significant, it is being increasingly eroded by courts concerned that it may frustrate the donor's intent. Finally, acceptance of a valuable gift is usually presumed and thus rarely becomes an issue.[4]

[3] Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 U. Fla. L. Rev. 295, 303 (1992).

[4] *See generally* Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 Colum. L. Rev. 1876 (2001) (discussing how modern courts apply these elements).

[B] Intent

The donor must intend to make an immediate transfer of ownership to the donee. The statements and actions of the donor usually provide the best evidence of intent. In *Gruen v. Gruen*,[5] for example, the donor's intent to transfer rights in a painting to his son as a birthday present was established in part by a letter that expressly stated: "I therefore wish to give you as a present the oil painting by Gustav Klimpt of Schloss Kammer."[6] Alternatively, intent may be inferred from the donor's act of giving possession of the item to the donee, the nature and value of the item, the relationship between the parties, and other circumstances.

If the donor intends the "gift" to take effect in the future (e.g., upon the donor's death), it is a nullity that confers no rights on the donee. Suppose R plans to produce a musical comedy, and tells E: "After my musical is produced, I'll give you 5% of my share of the profits." Because R intends a future transfer only, no gift results. But the requisite intent for a present transfer will be found if R states instead: "I give you 5% of my share of the future profits from the musical."[7]

Under the same logic, if a condition precedent must be fulfilled before a gift becomes effective, no immediate transfer has occurred and thus no gift will be found. But an invalid conditional gift may be enforceable as a valid contract. If R tells E, "when you bring me that photograph, I'll give you that rare stamp we discussed," R's statement could be seen as an offer for a unilateral contract, which E can accept through the act of bringing R the photograph. However, a gift that takes immediate effect may be made subject to a condition subsequent (e.g., "I give you this rare stamp, but if you don't visit me next week the gift will be void.").

Conditional gift issues arise most commonly in the special context of engagement presents. Suppose that M gives W an engagement ring, the engagement is later broken, and W refuses to return the ring. Who is entitled to the ring? Courts uniformly agree that an engagement ring is given subject to the implied condition subsequent of future marriage. Many courts still cling to the traditional view that the donor can recover the ring only if the engagement were dissolved by agreement or if the donee were at fault in breaking the engagement.[8] But a growing minority of courts follows a "no fault" approach to the issue, always allowing the donor to recover the ring.[9] Three rationales underpin this modern view: (1) because

[5] 496 N.E.2d 869 (N.Y. 1986).

[6] *Id.* at 871.

[7] Speelman v. Pascal, 178 N.E.2d 723 (N.Y. 1961) (letter demonstrated donor's intent to make a present gift of 5% of future profits from the musical "My Fair Lady"); *see also* Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986) (father intended the immediate transfer of a remainder interest in a painting to his son, even though the father retained a life estate).

[8] Vann v. Vehrs, 633 N.E.2d 102 (Ill. App. Ct. 1994) (agreement); Coconis v. Christakis, 435 N.E.2d 100 (Ohio County Ct. 1981) (recognizing rule, but finding no fault by donee).

[9] *See, e.g.*, Fierro v. Hoel, 465 N.W.2d 669 (Iowa Ct. App. 1990); Heiman v. Parrish, 942 P.2d 631 (Kan. 1997); Aronow v. Silver, 538 A.2d 851 (N.J. Super. Ct. Ch. Div. 1987) (condemning majority rule as "sexist and archaic"); Gaden v. Gaden, 272 N.E.2d 471 (N.Y. 1971); Lindh v. Surman, 742 A.2d 643 (Pa. 1999).

the engagement period is intended to allow a couple to test the permanency of their mutual feelings, the donor should not be penalized for avoiding an unhappy marriage; (2) it is extraordinarily difficult to assess fault in this setting; and (3) just as fault has become irrelevant to divorce proceedings, it should be irrelevant to breaking an engagement.

[C] Delivery

[1] The Requirement of Delivery

The second traditional requirement for the validity of a gift is delivery.[10] The United States inherited the English common law rule that words alone were insufficient to effect a gift of personal property. As a leading English decision explained: "[I]n order to transfer property by gift . . . there must be an actual delivery of the thing to the donee. Here the gift is merely verbal."[11] Under this early view, "delivery" meant physically handing over the chattel to the donee. Over time, three additional types of delivery have been accepted: constructive delivery, symbolic delivery, and delivery through a third person.[12]

Why require delivery at all? Its genesis is found in the feudal mindset which inextricably linked title and possession; title to a chattel could be transferred only by transferring possession. The requirement survived the centuries because—as Philip Mechem summarized in a famous article[13] —it arguably serves three policy goals. First, the donee's possession helps to demonstrate the donor's intent to make a gift. Second, the delivery requirement warns the donor about the legal significance of the act, preventing impulsive conduct that the donor might later regret. Finally, the donee's possession provides prima facie evidence that a gift was made.

English law recognized one exception to the delivery requirement: if title to a chattel was transferred by a *deed of gift,* manual delivery was unnecessary. In this context, a deed of gift meant a formal written instrument that:

(1) contained language reflecting the donor's intent to make a gift;

(2) described the subject matter of the gift;

(3) identified the donee; and

(4) was "sealed" (that is, bore a wax impression of the donor's personal seal).

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[10] *See, e.g.*, Irvin v. Jones, 832 S.W.2d 827, 827 (Ark. 1992) (finding no gift of certificates of deposit where the alleged donee had "retained sole possession of the certificates at all times and . . . never delivered them to appellants"); *see also* Irons v. Smallpiece, 106 Eng. Rep. 467 (R.B. 1819) (the landmark English decision imposing the delivery requirement).

[11] Irons v. Smallpiece, 106 Eng. Rep. 467, 468 (R.B. 1819).

[12] There are, of course, various exceptions to the delivery requirement (e.g., property already in the possession of the donee need not be delivered).

[13] Philip Mechem, *The Requirement of Delivery of Gifts in Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 Ill. L. Rev. 341 (1926).

The American reaction to this exception was mixed; some states followed the English approach, while others permitted the use of a deed of gift only if manual delivery was impractical. Since then, virtually all states have eliminated the traditional distinction between sealed and unsealed instruments. In light of this, would an unsealed, informal writing such as a letter obviate the need for manual delivery even if such delivery could easily be made? Certainly the main current of American law is flowing in this direction, though with a semantic twist. Rather than relying on deed of gift terminology, modern courts refer to the use of a writing as *symbolic delivery*.

[2] Methods of Delivery

[a] Manual Delivery

Traditionally, "delivery" connoted *manual delivery*, sometimes called *actual delivery*. In order to deliver an item of personal property, the donor physically transferred possession of the item to the donee. If the item was small and portable—like a ring—the donor usually handed it directly to the donee. For example, R, a guest at E's birthday party, delivers her wrapped present by placing it into E's outstretched hands. Manual delivery is the main method of delivery today for items of tangible personal property.

The limitations of manual delivery, however, are readily apparent. Some items of tangible personal property are too cumbersome and bulky to be handed to a donee (e.g., a large marble statue), while others may not be readily available (e.g., located in a distant state or pledged to a creditor). And manual delivery is impracticable when the donee receives less than complete title to the item (e.g., a one-tenth interest or a remainder interest). Finally, intangible personal property—by definition—cannot be manually delivered.

[b] Constructive Delivery

All jurisdictions permit *constructive delivery* when manual delivery is impracticable or impossible. Under the conventional view, constructive delivery occurs when the donor physically transfers to the donee the means of obtaining access to and control of the property, most commonly by handing over a key. For example, in *Newman v. Bost*[14] the donor effected constructive delivery of a bureau and other household furniture by handing the donee the keys that unlocked these items. Similarly, buried coins are constructively delivered when the donor informs the donee of their location, while range cattle are deemed delivered when the donor rebrands them with the donee's brand.[15]

Suppose that R receives a check, endorses it in favor of her apartment roommate E, places it on the kitchen table during E's absence, and then

[14] 29 S.E. 848 (N.C. 1898).

[15] *See also* Braun v. Brown, 94 P.2d 348 (Cal. 1939) (delivery of key to safe deposit box was constructive delivery of contents). *But see In re* Estate of Evans, 356 A.2d 778 (1976) (contra).

abandons the apartment. Is this constructive delivery of the check to E? Because manual delivery of the check was possible, the traditional answer is "no." In the landmark decision of *Scherer v. Hyland*,[16] however, the New Jersey Supreme Court dramatically expanded the definition of constructive delivery and found a valid gift on these facts. As the *Scherer* court explained, this approach "would find a constructive delivery adequate to support the gift when the evidence of donative intent is concrete and undisputed, there is every indication that the donor intended to make a present transfer . . . and when the steps taken by the donor . . . must have been deemed by the donor as sufficient to pass the donor's interest."[17]

[c] Symbolic Delivery

Most jurisdictions also permit *symbolic delivery* when manual delivery is difficult. Under this approach, an object that represents or symbolizes the gift is physically handed to the donee. Although in theory virtually any symbol might suffice (e.g., a Rolls-Royce hood ornament might symbolize the car), in practice this type of delivery is almost always effected by giving the donee some type of writing. In *Speelman v. Pascal*,[18] for example, the donor's letter giving the donee a share in future profits from the musical "My Fair Lady" was held an effective symbolic delivery.

The modern trend is to recognize an informal writing as symbolic delivery even when manual delivery is possible,[19] as evidenced by the well-known New York decision of *In re Cohn*.[20] There, the donor signed and dated a memorandum that recited "I give this day to my wife . . . five hundred shares of American Sumatra Tobacco Company common stock," but failed to hand over the stock certificates to her.[21] As the dissent protested, "there was no physical or other impossibility to the actual delivery of the stock."[22] Reasoning that the delivery requirement was intended to guard against fraud, mistake, or undue influence—and finding none—the majority found the memorandum to be effective symbolic delivery.[23]

[d] Delivery to Third Person

Delivery of a gift may be effected through a third party intermediary. Suppose that R manually delivers a gold watch to T, with instructions that T in turn deliver it to E; T then hands over the watch to E. This is a complete

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[16] 380 A.2d 698 (N.J. 1977).

[17] *Id.* at 701.

[18] 178 N.E.2d 723 (N.Y. 1961).

[19] While most states reach this result through case law, others have adopted statutes that provide that symbolic delivery is always permitted. *See, e.g.*, Cal. Civ. Code § 1147.

[20] 176 N.Y.S. 225 (App. Div. 1919).

[21] *Id.* at 225.

[22] *Id.* at 232 (Page, J. dissenting).

[23] *See also* Gruen v. Gruen, 496 N.E.2d 869, 874 (N.Y. 1986) (letter from donor to donee constituted valid symbolic delivery of vested remainder in painting; physical delivery of painting to donee not required because "it would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain").

gift. But which transfer constituted delivery: R's transfer to T or T's transfer to E? The answer turns on T's status. If T was an agent of R (and thus subject to R's control), then the gift was not complete until T handed the watch to E. Conversely, if T was an agent of E, the gift was complete when T obtained possession.

What if R changes her mind while T still possesses the watch and demands its return? The central question is again T's status. If T is R's agent, then the gift has never been completed and R may revoke it; but if T is E's agent, the gift is irrevocable.

It is well-settled law that the status of the third party intermediary turns on the donor's intent. Thus, the donor's express statement of intent at the time of the transfer to the intermediary is usually controlling (e.g., suppose R handed the watch to T, saying: "Hold this watch as trustee for E"). All too commonly, however, the donor's intent is unclear and must be judicially determined from the circumstances of the case.

A donor may use third party delivery to create a valid conditional gift. For example, assume that R hands the watch to T, saying: "Deliver this watch to E when he passes the state bar examination and hold it as his trustee until then." Because T is E's agent, the transfer to T constituted immediate delivery of the watch, completing the gift. But E is not entitled to possession of the watch until he passes the state bar examination.

[3] Demise of the Delivery Requirement

Enforcement of the delivery requirement may defeat the donor's intent. Suppose that R tells her friend E, in the presence of ten witnesses: "I hereby give you the Rembrandt painting hanging on my living room wall; I wouldn't want my greedy nephew N to get it." E replies: "Thanks, I accept." Ignorant of the law, R fails to hand over the painting to E and dies the next day, leaving no will. Under the rules of intestate succession, all the property R owned at her death is inherited by N, her only living relative. Many courts would invalidate R's attempted gift on these facts due to lack of delivery and award the painting to N, even though R's contrary intent was clear.

The delivery requirement is slowly disappearing. Over 80 years ago, a farsighted legal scholar criticized delivery as a feudal anachronism and predicted its demise.[24] Since then, judicial expansion of constructive and symbolic delivery has eroded the traditional rule.[25] Thus, although the text of the Restatement (Third) of Property: Wills and Other Donative Transfers formally asserts that delivery is required,[26] one of the comments recognizes

[24] Harlan F. Stone, *Delivery of Gifts in Personal Property*, 20 Colum. L. Rev. 196 (1920); *see also* Chad A. McGowan, *Special Delivery: Does the Postman Have to Ring at All—The Current State of the Delivery Requirement for Valid Gifts*, 31 Real Prop. Prob. & Tr. J. 357 (1996); Patrick J. Rohan, *The Continuing Question of Delivery in the Law of Gifts*, 38 Ind. L.J. 1 (1962).

[25] *See, e.g., In re* Drewett, 34 B.R. 316 (E.D. Pa. 1983) (finding a valid gift of diamond ring, even though donor continued to wear ring and never executed any writing).

[26] Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 (2003) (providing that the required "transfer" may be made either by "delivering the property to the donee" or by "inter vivos donative document," that is, through symbolic delivery).

a special exception: "[T]his Restatement adopts the position that a gift of personal property can be perfected on the basis of donative intent alone if the donor's intent to make the gift is established by clear and convincing evidence."[27]

The law of gifts will remain unsettled while the delivery requirement lingers. In the interim, courts will continue the trend of subordinating delivery to intent. When evidence of donor intent is compelling, many courts will ignore delivery; if evidence of donor intent is weak, however, courts may rely on a lack of delivery to invalidate a gift.

[D] Acceptance

The third element for a valid gift—acceptance by the donee—is easily established in almost all instances. Even absent any affirmative statements or conduct by the donee indicating acceptance, courts universally presume acceptance of a gift that is unconditional and valuable to the donee.[28] Thus, if R intends to give an antique vase to E and delivers it to him, E's acceptance of the vase is presumed. The gift will fail only if E expressly refuses to accept it.[29]

§ 5.04 Gifts Causa Mortis

[A] General Rule

A gift causa mortis may be defined as a gift of personal property in anticipation of the donor's imminently approaching death.[30] Unlike a gift inter vivos, a gift causa mortis is revocable. The donor may revoke such a gift at any time before his death. In addition, if the donor does not die from the anticipated peril, the gift is automatically revoked as a matter of law.[31] A valid gift causa mortis requires all three gift inter vivos elements (intent, delivery, and acceptance) plus a fourth element: the donor's expectation of imminent death.[32]

The gift causa mortis is best viewed as an emergency substitute for a will. Suppose that D collapses and is rushed to the hospital by her niece N, where the doctor advises D that her death is only minutes away; there is insufficient time for D to prepare and execute a will. D privately hands

[27] Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 com. yy (2003).

[28] Scherer v. Hyland, 380 A.2d 698 (N.J. 1977); *see also* Restatement (Third) of Property: Wills and Other Donative Transfers § 6.1(b) (2003).

[29] Why might a donee like E refuse a valuable gift? Possible reasons include: (1) to avoid adverse tax consequences; (2) to thwart creditors; and (3) to avoid a moral obligation to the donor.

[30] Coley v. Walker, 680 So. 2d 352 (Ala. Civ. App. 1996).

[31] Most American courts view the gift causa mortis as a gift subject to a condition subsequent that the donor die from the anticipated peril.

[32] *See, e.g.*, Foster v. Reiss, 112 A.2d 553 (N.J. 1955) (attempted gift of money, bank account, and stock via decedent's handwritten note held invalid due to lack of delivery).

her diamond ring to N, saying: "I give you this ring." Under these circumstances, it makes sense to enforce D's gift.[33]

[B] Donor's Anticipation of Imminent Death

Although the classic gift causa mortis occurs at the donor's deathbed, the doctrine also extends to other situations where death may be weeks or even months away. Most gift causa mortis decisions involve a donor confronting the substantial certainty of death in the near future from a particular illness or affliction, such as a cardiac patient about to undergo a risky operation. A gift made by a donor contemplating suicide may also meet this standard.[34] A donor's natural apprehension of death in the distant future, however, does not support a gift causa mortis.

[C] Criticism of Doctrine

The typical gift causa mortis lacks the formal safeguards that the law requires for a valid will (e.g., a writing, disinterested witnesses). Thus, courts often view the doctrine with disfavor (and even hostility), fearing that it encourages fraud, perjury, and undue influence.[35]

For example, assume that after A dies, his brother B begins wearing A's valuable ring; when questioned, B asserts that A gave him the ring when they were alone in A's hospital room a few moments before A died. How can a court now determine if A actually intended a gift? In a case involving a claimed gift inter vivos, the donor is usually alive to testify concerning intent; if the donor is dead, evidence that the donee held long-term possession of the item without any objection allows an inference of donor intent. In contrast, here both A's testimony and evidence of A's acquiescence in B's possession of the ring are unavailable. B is the only witness to the alleged gift, raising concerns that his story is a tangle of lies. Or was the gift the product of undue influence that B exerted while A was in a highly vulnerable condition?

§ 5.05 Restrictions on Donor's Autonomy

Suppose that R exchanges some of his property for a stack of $100 bills and begins handing the bills to strangers passing by on the sidewalk. Assuming that the elements of intent, delivery, and acceptance are all present, the legal system will not question R's actions. The competing jurisprudential theories that underpin American property law agree that R has the right to give his property away to anyone he chooses.[36]

[33] *See, e.g.*, Newman v. Bost, 29 S.E. 848 (N.C. 1898) (former manager of opera house, on deathbed and stricken with paralysis, made gift causa mortis to housekeeper).

[34] *See, e.g.*, Scherer v. Hyland, 380 A.2d 698 (N.J. 1977). In some states, however, a gift in contemplation of suicide is void as against public policy.

[35] *See, e.g.*, Newman v. Bost, 29 S.E. 848, 848 (N.C. 1898) (noting that the doctrine arose in an era when "[l]earning was not so general, nor the facilities for making wills so great then as now").

[36] Moreover, public policy encourages charitable donations, as evidenced by the charitable deduction available under the Internal Revenue Code.

Statutory exceptions have somewhat eroded this general rule in extreme situations. For example, elderly parent P cannot freely give away assets to her child C in order to impoverish herself and thus qualify for federal Medicaid benefits.[37] Similarly, most states restrict lifetime gifts by one spouse that are intended to nullify the property rights that the law accords to a surviving spouse (*see* § 11.03[D]).

[37] 42 U.S.C. § 1396p(c); *see also* Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & Pol. 195, 219–27 (1996).

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Property

Ninth Edition

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Wolters Kluwer

V. GIFTS

A. Definition of gift:
A gift is the voluntary transfer of property by one person to another without any consideration or compensation.

1. Present transfer: A gift is a present transfer of property. If the gift is to take effect only in the future, it is a mere promise to make a gift, and is unenforceable as a contract because of its lack of consideration.

2. Inter vivos vs. causa mortis gift: We do not discuss gifts of property by will in this chapter. The gifts that we consider here fall into two categories: (1) gifts "inter vivos" and (2) gifts "causa mortis". An inter vivos gift is an ordinary one in which the donor is not responding to any threat of death. A gift causa mortis is one made in contemplation of immediate approaching death.

Most of the rules governing the two classes of gifts are the same, but where there are differences, these are noted below.

The principal difference is that an ordinary gift inter vivos is not revocable once made (i.e., the donor cannot "take back" the gift, as a matter of law) but the gift causa mortis is automatically revoked if the donor escapes from the peril of death which prompted the gift.

3. Requirements: There are three requirements for the making of a valid gift (whether inter vivos or causa mortis): (1) there must be a delivery from the donor to the donee either of the subject matter of the gift, or of a written instrument embodying the terms of the gift; (2) the donor must possess an intent to make a gift; and (3) the donee must accept the gift.

B. Delivery:
The essence of the requirement of delivery is that control of the subject matter of the gift must pass from the donor to the donee.

1. Rationale: The main rationale for the requirement of delivery is that without such a requirement, gifts would be enforceable even if the only evidence showing they had been made was an oral statement on the part of the alleged donor.
This would leave people open to ill-founded and fraudulent claims of gift. Therefore, courts require delivery as additional proof that a gift was really intended and made.

2. Symbolic and constructive delivery: There are some types of personal property which because of their nature cannot be physically delivered (e.g. certain intangibles, such as the right to collect a debt from another person).

There are other types of personal property which, while theoretically capable of manual delivery, would be highly inconvenient to deliver (e.g. heavy furniture.)

Yet to dispense with the requirement of delivery altogether in such cases would leave alleged donors open to false claims that a gift had been made.

Accordingly, the courts have adopted a middle position in such cases, and permit "symbolic" or "constructive" delivery. (A delivery is symbolic if, instead of the thing itself, some other object is handed over in its place.

A delivery is constructive if the donor delivers the means of obtaining possession and control of the subject matter, rather than making a manual transfer of the subject matter itself.)

a. Difficult or impossible to make manual transfer: Constructive or symbolic delivery will not be allowed unless delivery of the actual subject matter would be impossible or impractical.

b. Dominion must be surrendered: Also, a symbolic or constructive delivery will not be effective unless the donor has parted with dominion and control of the property.

c. Use of key: The delivery of a key to a locked receptacle will often constitute adequate constructive delivery of the receptacle's contents. Use of the key will be upheld whenever the manual transfer of the contents would be impractical or inconvenient.

Example: O is paralyzed and confined to his bed. O gives various keys to P (his housekeeper), telling her that everything in the house is hers. The keys unlock several items of heavy furniture, including a bureau in which a life insurance policy on O's life is found.

Held, the delivery of the keys constituted constructive delivery of the items of furniture themselves, since the weight and bulk of these items made actual manual delivery nearly impossible.

But the keys did not constitute constructive delivery of the insurance policy, because the policy could have been manually delivered (e.g., by O's telling his nurse to hand the policy to O, who could have then handed it to P). Newman v. Bost, 29 S.E. 848 (N.C. 1898).

d. Intangibles: Often the subject matter of a gift is an intangible, i.e., a claim of some sort against another person. Since the claim itself cannot be physically transferred, the courts are compelled to recognize constructive or symbolic delivery.

i. Document as embodiment of claim: Some types of intangibles have a document so closely associated with them that the document is treated as the embodiment of the claim. The business custom is to assign the obligation by transferring the document, and by surrendering the document to the obligor when the obligation has been satisfied. Any negotiable instrument falls within this class (e.g., promissory notes, bonds, bills of lading, etc.). Also usually considered within this class are stock certificates, insurance policies and savings bank account passbooks. Therefore, as to all these items, courts hold that delivery of the document is sufficient to constitute delivery of the intangible claim represented by it.

ii. Savings accounts: In some situations, a gift of the contents of a savings account may be made even without delivery of physical possession of the savings passbook to the donee; the issue of bank accounts is discussed further infra.

3. Written instrument: Virtually all courts hold that delivery to the done of a written instrument under seal stating the particulars of the gift constitutes sufficient delivery.

a. Unsealed instrument: Where a written instrument is given to the donee, but it is not under seal, the courts are split. Most courts hold that even an unsealed instrument is a valid substitute for physical delivery of the subject matter of the gift, assuming the instrument is a clear symbol of the right to possess the subject matter.

Example: O writes to his son, P, that O wishes to give P his valuable Klimt painting, but that O wishes to retain possession of the painting for his lifetime. Held, this letter (together with other correspondence between O and P) sufficed to meet the delivery requirement, and physical delivery of the painting itself was therefore not required. Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986), discussed more extensively.

4. Gifts causa mortis: Courts are generally hostile to gifts causa mortis, i.e., made in contemplation of the donor's death. Therefore, they frequently impose stricter requirements for delivery in such cases than where the gift is made inter vivos with no expectation of death.

Courts have been more likely to require actual physical delivery in such cases, at least if the property is capable of readily physical delivery.

a. Revocation: One essential feature of a gift that's determined to be causa mortis is that if the donor does not die of the contemplated peril, the gift may be revoked. In fact, most courts hold that the failure of the donor to die from the contemplated peril automatically revokes the gift, even if the donor indicates a desire that the gift remain valid.

b. Contemplation of death: The gift causa mortis, as noted, is one made in contemplation of death. In any case where the donor dies shortly after making the gift, the court will presume that the gift is causa mortis, unless the donee comes forward with evidence that the donor was not acting in contemplation of death.

And, as noted, once the court decides the gift is causa mortis, the court is likely to impose strict physical delivery requirements.

i. Rationale: Why do courts impose stricter delivery requirements for gifts causa mortis than other gifts?

Because courts worry that if they don't do this, such gifts will interfere with statutes requiring that wills meet certain formalities (e.g., attestation) to reduce fraud.

That is, the fear is that a claimant will falsely say, "He gave me a gift of [item X] just before he died, but he told me I couldn't take possession until after his death." Since oral gifts (unlike oral wills) are valid, if there's no requirement of physical delivery the opportunity for false claims is large.

ii. Portable: Courts are especially skeptical of the validity of a gift causa mortis without physical delivery where the item is portable (e.g., a document), so that the donor/decedent could easily have made physical delivery if she had wanted to.

C. Donor's intent to give:

In addition to a delivery, there must be an intent on the part of the donor to make a gift. Obviously, if A hands B A's diamond ring and says "Take care of this for me until I ask for it back," there has been no gift even though there has been a delivery.

1. Intent to make present gift: Furthermore, the intent must be to make a present transfer, not one to take effect in the future.

2. Present gift of future enjoyment: However, courts generally go out of their way to find that there has been a present gift of the right to the subject matter, with only the enjoyment postponed to a later date. In the case of personal property (as with real property), there may be a present transfer of title, with the right of enjoyment postponed until a future date.

a. Gift subject to life estate: For instance, most courts hold that a donor may make a valid gift of a future interest in personal property, subject to the donor's life estate.

In this situation, even though the donor does not immediately deliver the subject matter of the gift to the donee, the intent to make a present gift will usually be found to have been satisfied.

Example: In 1963, O writes a letter to his son, P, saying that O is giving P his valuable Gustav Klimt painting for P's birthday. The letter says, however, that O wishes to retain possession of the painting for O's lifetime. A subsequent letter by O to P similarly refers to O's intent to make a present gift of the painting to P, subject to O's right to lifetime possession.

The painting remains in O's possession until his death in 1980, at which time D, P's stepmother, refuses to turn the painting over to P. D contends that:

(1) O never intended to make an ownership transfer in 1963, but only expressed the intent that P would get the painting on O's death; and

(2) if physical delivery of the subject of the gift is possible, such delivery (rather than delivery of a written instrument) must take place for the gift to be valid.

Held, for P. As to argument (1), it is true that the donor must intend a present gift (not a future gift), but here there was clear evidence of O's intent to make a present transfer of a remainder interest in the painting (subject to O's life interest).

As to argument (2), the very purpose of the remainder-subject-to-a-life-interest structure used by O was to permit O to keep possession of the painting during his lifetime, so it would be illogical (and therefore not required) for O to deliver the painting to P; therefore, a written instrument was enough to meet the delivery requirement. Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986).

D. Acceptance: Courts usually hold that the giving of a gift is a bilateral transaction requiring an acceptance of the gift on the part of the donee.

However, at least if the gift is a beneficial one, the court will presume that the donee intended to accept.

1. Donee unaware: The issue usually arises where the donor gives the property to a third person to be held until it is given to the donee; if the donor dies before the donee ever learns of the gift, it can be argued that the gift was invalid for lack of acceptance (since the gift could obviously not have been made after the donor died.)

However, the courts have usually held that the gift took effect immediately upon its execution by the donor, subject to the donee's right to repudiate it subsequently.

So long as no repudiation occurs after the donor's death, the gift is valid.

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Review

New York State Bar Review

Outlines:

- PERSONAL PROPERTY
- REAL PROPERTY
- CONSTITUTIONAL LAW
- NEW YORK TRUSTS
- NEW YORK WILLS

LIENS

A. COMMON LAW LIEN

A common law lien is the right to possess and retain personal property which has been improved or enhanced in value by the person who claims the lien until the person claiming the property pays in full all charges attaching to the property for such improvement. Every lien requires that (i) a debt has arisen from services performed on the thing, (ii) title to the thing is in the debtor, and (iii) possession of the thing is in the creditor. A lien is a security device to enforce payment.

B. CLASSES OF LIENS

Common law liens are divided into two classes: ***general*** and ***special.***

1. General Lien

A general lien is the right to retain ***all of the property*** of another person as security for a general balance due from such other person. A factor, a del credere agent, and a universal agent have a general lien on the property of their principal in their possession.

2. Special Lien

A special lien is the right to retain ***specific property*** of another to secure some particular claim or charge which has attached to the property retained. A common or private carrier, a warehouser or ordinary bailee, a trustee, an attorney at law, an arbitrator, and a general or special agent all have a special, not a general, lien on the property of others in their possession. [Sheinman and Salita, Inc. v. Paraskevas, 22 Misc. 2d 436 (1959)].

3. Consequence of Classification

The question as to whether a lien is general or special becomes important only when the lien holder releases a portion of the chattels held as security. *Note:* Where doubt exists, a lien is construed as special rather than general.

a. General Lien

If a lien holder has a general lien and releases part of the chattels, he releases ***no portion of his lien*** and he may hold the unreleased portion until the entire lien charge is paid.

b. Special Lien

If the lien is a special lien and the lien holder releases a portion of the chattels held, he thereby waives his lien ***to the extent of the chattels released.***

C. PARTICULAR PROBLEMS REGARDING LIENS

1. Lien Given by One Not the Owner

A lien is a proprietary interest, a qualified ownership, and, in general, can only be created by the owner or by someone authorized by him.

Example: A person in possession of a truck with the owner's permission cannot create a lien for repairs. The fact that the repairs are of benefit to the owner is immaterial.

2. Innkeepers and Common Carriers

The lien of an innkeeper and a common carrier is recognized by the common law on the theory that common carriers and innkeepers, being compelled by law to indiscriminately accept all persons who presented themselves, must be protected and secured in their just charges for the services rendered.

a. Innkeepers

The lien of an innkeeper is peculiar in nature, in that it attaches to any property brought into the inn by the guest, although it is not essential that the guest should, in all cases, be the owner of such property. The property may be that of a third person, or even stolen goods, and if the innkeeper has no knowledge that such property is not rightfully in the possession of the guest, his lien will attach generally to all such property to the extent of a reasonable charge for the services rendered.

Example: The samples of a traveling sales representative are subject to a lien for an innkeeper's charges and may be sold, after proper notice, to satisfy such charges, even though the innkeeper has full knowledge that they are owned by the guest's employer.

b. Common Carriers

Although a common carrier is generally required, like an innkeeper, to accept all goods delivered, unlike the innkeeper, it has no lien on the goods which it receives from persons other than the owner. The reason for this rule is that the carrier may demand transportation charges in advance, or in the alternative, proof from the shipper that he is acting with authority from the owner.

3. Warehouser

At common law the warehouser had no lien on the bailed chattel for the reason that he did not in any manner improve it. Gradually, a lien was extended to the warehouser to secure him for the time and labor expended on the chattel and for his storage charges. The lien is now embodied in U.C.C. section 7-209, and this statute has survived federal and constitutional challenge. *[See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)] However, its status under the New York State Constitution is uncertain. (See below.)

4. New York Constitutional Law Problem

In spite of the fact that the Supreme Court upheld the provisions for enforcement of the warehouser's lien [U.C.C. §7-210] in *Flagg Bros., Inc. v. Brooks, supra* (no state action), the New York Constitution has been held to prohibit the ex parte sale of property to satisfy the lien of a garagekeeper. [Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152 (1978)]

And note: Actual notice to a lienor whose interest is subordinate to an artisan's lien is necessary before the sale of the property. [Motor Discount Corp. v. Scappy & Peck Auto Body, Inc., 12 N.Y.2d 227 (1963)]

D. WAIVER OF LIEN

1. By Contract

Although a lien is conferred by law, it may be waived by any contract inconsistent with the existence of the lien. Such contracts usually occur when the artisan agrees to deliver the goods before payment for his services is to be made.

Example: If a person delivers cloth to a tailor to be made into a garment, under an agreement by which the tailor is to be paid for his services 30 days after the completion and delivery of the garment, the tailor has no lien on the goods.

2. By Acceptance of Other Security

Where a lienor accepts security for payment, the security eliminates the common law lien. The acceptance of such security indicates an intention to regard it as a substitute for the lien.

3. Demand for Unlawful Charges

Where the lienor includes in his valid lien amounts in excess of his lawful charges, he indicates that a tender of the lawful amount by the owner will not be accepted. A tender, therefore, is waived; the lienor is placed in default and becomes liable in an action of replevin or trover.

4. Reservation of Lien or Temporary Use by Bailor

The lien is not lost if the lienholder surrenders the goods to the bailor specially reserving his lien or the bailor is permitted to make temporary use of the property. Therefore, a garagekeeper does not lose his lien on automobiles stored in his garage where the owners are permitted to use their cars daily.

In the case of surrender of temporary possession, the lien enjoys priority over the claims of the bailor's subsequent creditors.

New York Jurisprudence 2d

LIENS

John A. Gebauer, J.D.

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Scope

This article broadly covers the subject of liens, including their creation, operation, and effect; whether created under common law, principles of equity, or statute; and includes treatment of the termination, waiver, and extinguishment of liens, as charges on specific property as security for the payment of debts, whether dependent upon or independent of possession. Also generally discussed are priorities among competing liens and the enforcement of liens on personal property, including the foreclosure of chattel liens.

Federal Aspects

This article covers generally the priority of liens held by the federal government and the effect of bankruptcy upon existing liens.

Treated Elsewhere

Agents' lien for reimbursement, see N.Y. Jur. 2d, Agency and Independent Contractors §§ 1 et seq.

Aircraft, liens on, see N.Y. Jur. 2d, Aviation and Airports §§ 1 et seq.

Animals, liens on, see N.Y. Jur. 2d, Animals §§ 1 et seq.

Architects' lien, see N.Y. Jur. 2d, Businesses and Occupations §§ 1 et seq.

Attachment, lien created by, see N.Y. Jur. 2d, Creditors' Rights and Remedies §§ 1 et seq.

Attorneys' lien, see N.Y. Jur. 2d, Attorneys at Law §§ 1 et seq.

Auctioneers' lien, see N.Y. Jur. 2d, Auctions and Auctioneers §§ 1 et seq.

Bailees' lien for work upon watch, clock, or jewelry, and other bailed property, see N.Y. Jur. 2d, Bailments and Chattel Leases §§ 1 et seq.

Banks, lien and right of setoff by, see N.Y. Jur. 2d, Banks and Financial Institutions §§ 1 et seq.

Brokers' lien, see N.Y. Jur. 2d, Brokers §§ 1 et seq.

Cemetery liens, see N.Y. Jur. 2d, Cemeteries and Dead Bodies §§ 1 et seq.

Chattel, recovery of, generally, see N.Y. Jur. 2d, Conversion and Action for Recovery of Chattel §§ 1 et seq.

Corporations or partnerships, liens on and of, see N.Y. Jur. 2d, Business Relationships §§ 1 et seq.

Factors' and commission merchants' lien, see N.Y. Jur. 2d, Factors and Commission Merchants §§ 1 et seq.

Garagekeepers' lien, see N.Y. Jur. 2d, Garages, Filling, and Parking Stations §§ 1 et seq.

Hospitals and related facilities, liens of, see N.Y. Jur. 2d, Hospitals and Related Health Care Facilities §§ 1 et seq.

Innkeepers' lien, see N.Y. Jur. 2d, Hotels, Motels, and Restaurants §§ 1 et seq.

Insurable interest in lien, see N.Y. Jur. 2d, Insurance §§ 1 et seq.

Insurance proceeds, lien on, see N.Y. Jur. 2d, Insurance §§ 1 et seq.

Judgment lien, see N.Y. Jur. 2d, Judgments §§ 1 et seq.

Laundry establishments' lien, see N.Y. Jur. 2d, Businesses and Occupations §§ 1 et seq.

Landlords' lien, see N.Y. Jur. 2d, Landlord and Tenant §§ 1 et seq.

Logs and timber, liens on, see N.Y. Jur. 2d, Logs and Timber §§ 1 et seq.

Mechanic's lien and foreclosure on real property thereon, see N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

Mortgage liens, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 1 et seq.

Purchaser of real property, lien of, see N.Y. Jur. 2d, Real Property Sales and Exchanges §§ 1 et seq.

Recordation of liens and effect of lien on land title, see N.Y. Jur. 2d, Abstracts and Land Titles §§ 1 et seq.

Security interests in personal property, generally, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

Tax liens, see N.Y. Jur. 2d, Taxation and Assessment §§ 1 et seq.

Vehicles, liens on, see N.Y. Jur. 2d, Automobiles and Other Vehicles §§ 1 et seq.

Vendor of real property, lien of, see N.Y. Jur. 2d, Real Property Sales and Exchanges §§ 1 et seq.

Warehousemens' and carriers' lien, generally, see N.Y. Jur. 2d, Documents of Title §§ 1 et seq.

Watercraft, liens on, see N.Y. Jur. 2d, Boats, Ships, and Shipping §§ 1 et seq.

Workers' compensation benefits, lien of, see N.Y. Jur. 2d, Workers' Compensation §§ 1 et seq.

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American Jurisprudence Pleading and Practice Forms Annotated (AMJUR-PP)
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Carmody-Wait 2d New York Practice with Forms (CW2d)

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New York Forms Legal and Business (NY-LF)
Lien Priorities in New York (NYLIENPR)
Evidence in New York State and Federal Courts (NYPRAC-EVID)

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I. CREATION, OPERATION, AND EFFECT OF LIENS

A. GENERAL CONSIDERATIONS

Research References

West's Key Number Digest

Liens ⚷1, 11, 13, 14

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Secured Transactions
West's A.L.R. Digest, Liens ⚷1, 11, 13, 14

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 1 to 51
C.J.S., Liens §§ 1 to 24

1. In General

§ 1 Definitions; classification

Research References

West's Key Number Digest, Liens ⚷1

A lien is a legal right that may be exercised over property in satisfaction of a debt[1] or a duty of the owner of the property.[2] It may be defined as an encumbrance upon land. An encumbrance is every

[Section 1]

[1]Rohrbach v. Germania Fire Ins. Co., 62 N.Y. 47, 1875 WL 9335 (1875).

Bramhall-Deane Co. v. McDonald, 172 A.D. 780, 158 N.Y.S. 736 (1st Dep't 1916).

Nelson v. Gibson, 143 A.D. 894, 129 N.Y.S. 702 (3d Dep't 1911).

Mathushek & Son Piano Co. v. Weld, 94 Misc. 282, 158 N.Y.S. 169 (App. Term 1916).

As to the rights of a lienor to en-

right to or interest in real property, other than an easement for a highway, to the diminution of the value of the real property though consistent with conveyance of the fee interest therein.[3] In the strict or common-law sense of the term, a person may not have a lien on his or her own property.[4] A specific lien is a charge upon specific property, by which it is held for the payment or discharge of a particular debt or duty, in priority to the general debts or duties of the owner.[5]

Liens are broadly classified as common law, generally dependent upon possession;[6] equitable, not dependent upon possession;[7] statutory, which may or may not be based upon possession;[8] and maritime.[9] Liens on personal property, or chattel liens, are classified by the particular basis or purpose of the lien and include judgment liens[10] and security interests.[11]

§ 2 Lien distinguished from other legal devices

Research References

West's Key Number Digest, Liens ⚷1

A lien, while analogous to a mortgage or a pledge, is more comprehensive and includes such devices, as well as all similar obligations by which specific property may be subjected to the payment of a particular debt.[1] A security interest, or chattel mortgage, is distinguishable from a common-law lien by the absence of a right to possession until default by the mortgagor while it is essential that the lienor have at all times possession of the personal property to establish and sustain the right of a common-law lien.[2] While a pledge resembles a common-law lien, the former is unlike the latter in that the chattels in a pledge are delivered as security for a loan or the payment of indebtedness whereas a common-law lien arises from a delivery for

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force the lien, generally, see §§ 53 to 76.

[2]Rohrbach v. Germania Fire Ins. Co., 62 N.Y. 47, 1875 WL 9335 (1875).

[3]Village of Spring Valley Urban Renewal Agency v. K. G. R. Realty Co., 82 Misc. 2d 1082, 371 N.Y.S.2d 579 (County Ct. 1975).

[4]Bishop v. Spector, 150 Misc. 360, 269 N.Y.S. 76 (Sup 1932).

[5]Rohrbach v. Germania Fire Ins. Co., 62 N.Y. 47, 1875 WL 9335 (1875).

[6]§ 11.

[7]§§ 13 to 22.

[8]§§ 23 to 38.

[9]N.Y. Jur. 2d, Boats, Ships, and Shipping §§ 132 to 146.

[10]N.Y. Jur. 2d, Judgments §§ 160 to 188.

[11]N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

[Section 2]

[1]Am. Jur. 2d, Liens § 4.

For a detailed discussion of mortgages, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 1 et seq.

[2]§ 11.

For further discussion of secured transactions, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

work on or in connection with the chattels. An ordinary lien gives no right of property while a contract of pledge carries a special property in the pledge to the pledgee.[3] Moreover, unlike a pledge, a common-law lien generally may not be enforced by a sale of the property by the lienor except as authorized by statute.[4]

An equitable lien is distinguished from an equitable assignment in that the former conveys a charge upon but no title in the property while the assignee has title that, although not cognizable at law, equity will enforce.[5] In many respects, an equitable lien is like a constructive trust,[6] and in some cases, a court may grant relief on the basis of an equitable lien where the plaintiff has failed to establish a constructive trust.[7]

§ 3 Property subject to lien

Research References

West's Key Number Digest, Liens ⚷11

Common-law liens attach only to personal property,[1] but equitable[2] and statutory liens[3] may be acquired in nearly every form of property, real and personal.[4] The general rule is that a lien upon property attaches to whatever the property is converted into, whether property or money, and is not destroyed by changing the nature of the subject.[5] However, liens upon stock in a corporation do not attach to corporate

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[3]Am. Jur. 2d, Liens § 4.

[4]§ 57.

[5]In re Interborough Consol. Corp., 288 F. 334, 32 A.L.R. 932 (C.C.A. 2d Cir. 1923).

As to priority between equitable liens and assignments, see § 42.

[6]Gearns v. Commercial Cable Co., 177 Misc. 1047, 32 N.Y.S.2d 856 (Mun. Ct. 1942), aff'd, 266 A.D. 315, 42 N.Y.S.2d 81 (1st Dep't 1943), aff'd, 293 N.Y. 105, 56 N.E.2d 67, 153 A.L.R. 813 (1944).

[7]Towner v. Berg, 5 A.D.2d 481, 172 N.Y.S.2d 258 (3d Dep't 1958).

The plaintiff was not entitled to a constructive trust on a property, notwithstanding contributions to its upkeep for 30 years, where the record did not indicate any implied promise to convey, reimburse, or to grant a lesser interest in the property. Scivoletti v. Marsala, 61 N.Y.2d 806, 473 N.Y.S.2d 949, 462 N.E.2d 126 (1984).

As to equitable liens, generally, see §§ 13 to 22.

For a discussion of constructive trusts, see N.Y. Jur. 2d, Trusts §§ 164 to 190.

[Section 3]

[1]§ 11.

[2]§ 13.

[3]§ 23.

[4]Reynolds v. Ellis, 103 N.Y. 115, 8 N.E. 392 (1886).

For discussion of property to which an artisans' lien may attach, see § 30.

As to liens on real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

[5]Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903).

Long Island Ins. Co. v. S & L

funds held by a receiver since a stockholder has no legal title to corporate assets by virtue of stock ownership.[6] No equitable lien in favor of a surety, who has had to make good an amount embezzled, attaches to property given by the embezzler to another in the absence of proof that it was purchased with the stolen money.[7]

§ 4 Property subject to lien—After-acquired property

Research References

West's Key Number Digest, Liens ⚷11

An equitable lien may be created in after-acquired property.[1] A contract for a lien on property not yet in existence may be effectual in equity to give a lien as between the parties when the property comes into existence where there are no intervening rights of creditors or third persons.[2] However, the assignment of a future contingent interest in the principal of a trust does not give the lien creditor a choate lien.[3]

2. Rights in Lien

§ 5 Generally

Research References

West's Key Number Digest, Liens ⚷1

Although a lien by itself is not tangible personal property that may

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Delicatessen, 102 Misc. 2d 853, 424 N.Y.S.2d 849 (Sup 1980).

An equitable lien was imposed upon the entire stock and fixtures of a store after the defendants, who occupied a fiduciary relation to such owner, moved, mingled, and sold property of the owner; purchased new stock and fixtures from the proceeds; and so confused the remainder that it could not be identified and separated. Klinzing v. Blauw Bros., 160 N.Y.S. 631 (Sup 1916).

For discussion of the right to recover liened property, see § 7.

As to conversion, generally, see N.Y. Jur. 2d, Conversion, and Action for Recovery of Chattel §§ 1 to 88.

[6]First Nat. Bank & Trust Co. of Ellenville v. Hyman Novick Realty Corp., 68 A.D.2d 191, 416 N.Y.S.2d 844 (3d Dep't 1979).

[7]American Sur. Co. of N.Y. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929).

As to rights and remedies of a surety, generally, and with regard to embezzlement, see N.Y. Jur. 2d, Guaranty and Suretyship §§ 409 to 481.

[Section 4]

[1]Reynolds v. Ellis, 103 N.Y. 115, 8 N.E. 392 (1886).

For discussion of the creation of equitable liens, generally, see §§ 15 to 22.

As to security interests in after-acquired property, generally, under the Uniform Commercial Code, see N.Y. Jur. 2d, Secured Transactions § 82.

[2]Coats v. Donnell, 94 N.Y. 168, 1883 WL 12738 (1883).

[3]In re Rosenberg's Will, 62 Misc. 2d 12, 308 N.Y.S.2d 51 (Sur. Ct. 1970).

be sold by a sheriff, it represents, when combined with the underlying debt, a possessory right in the encumbered property with a concomitant right to sell that property if the debt is not satisfied.[1] A lien, while a charge upon property, confers no general right of property or title upon the holder.[2] The creation of an interest in real property by the filing of a statutory lien, without prior judicial approval, does not prevent the owner from selling, encumbering, renting, or otherwise dealing with the property as he or she chooses, even though filing of a lien creates a cloud on the owner's title, rendering alienation more difficult or perhaps less profitable.[3]

One who has a lien on insured property has no common-law right to insurance proceeds realized by the insured in the event of a loss of the property.[4] A lien possessed by a bank on real property owned by a husband and wife conveys a right only to the extent of a husband's interest therein where a settlement agreement, incorporated into the judgment of divorce, provides for a "gift over" by the wife of her interest to the husband.[5]

A right of subrogation is not a lien.[6]

§ 6 Assignability of lien

Research References

West's Key Number Digest, Liens ⚷13

[Section 5]

[1]U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

As to sale of personal property subject to lien, see §§ 59 to 76.

[2]Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903).

[3]Carl A. Morse, Inc. (Diesel Const., Division) v. Rentar Indus. Development Corp., 56 A.D.2d 30, 391 N.Y.S.2d 425 (2d Dep't 1977), order aff'd, 43 N.Y.2d 952, 404 N.Y.S.2d 343, 375 N.E.2d 409 (1978).

[4]Bank of India v. Weg and Myers, P.C., 257 A.D.2d 183, 691 N.Y.S.2d 439, 38 U.C.C. Rep. Serv. 2d 996 (1st Dep't 1999).

McGraw-Edison Credit Corp. v. All State Ins. Co., 62 A.D.2d 872, 406 N.Y.S.2d 337, 24 U.C.C. Rep. Serv. 767 (2d Dep't 1978).

As to rights of lienholders to proceeds on loss of insured property, generally, see N.Y. Jur. 2d, Insurance § 2281.

[5]Elyachar v. Elyachar, 47 A.D.2d 643, 364 N.Y.S.2d 14 (2d Dep't 1975) (bank had no valid claim to the proceeds).

For discussion of the distribution of marital property upon divorce, generally, see N.Y. Jur. 2d, Domestic Relations §§ 2606 to 2664.

[6]Kozlowski v. Briggs Leasing Corp., 96 Misc. 2d 337, 408 N.Y.S.2d 1001 (Sup 1978).

For discussion of subrogation rights of a guarantor or surety, generally, see N.Y. Jur. 2d, Guaranty and Suretyship §§ 420 to 456.

A lien, including an equitable lien, may be assigned.[1] Furthermore, the assignee of a lien that has been properly filed has priority over an asserted lien that has not been properly filed.[2] Where the debt is assigned, even without mention of the lien, the lien passes as an incident of the debt.[3] A lien will pass upon assignment of the claim and transfer of possession except when the transfer constitutes a material breach of the bailment.[4]

§ 7 Right to recover liened property

Research References

West's Key Number Digest, Liens ⚷14

In general, the holder of a merely equitable lien cannot avail himself or herself of an action to recover the property.[1] However, the holder of a valid lien on property in his or her possession has such a special property therein that he or she can maintain an action to recover the chattel if it is wrongfully taken from his or her possession even by the true owner.[2]

[Section 6]

[1]Payne v. Wilson, 74 N.Y. 348, 1878 WL 12662 (1878).

[2]Harman v. Fairview Associates, 30 A.D.2d 492, 294 N.Y.S.2d 442 (4th Dep't 1968), order rev'd on other grounds, 25 N.Y.2d 101, 302 N.Y.S.2d 791, 250 N.E.2d 209 (1969).

For discussion of priority among competing liens, see §§ 39 to 44.

As to assignable rights, generally, see N.Y. Jur. 2d, Assignments §§ 4 to 33.

[3]Mortgage Electronic Registration Systems, Inc. v. Coakley, 41 A.D.3d 674, 838 N.Y.S.2d 622 (2d Dep't 2007); Payne v. Wilson, 74 N.Y. 348, 1878 WL 12662 (1878).

The assignee of an ordinary artisan's lien where the debt is assigned and the chattel is transferred upon the same terms as those upon which the original lienor held it acquires the right to the lien as the true owner is not prejudiced. Triple Action Spring Co. of New York v. Goyena, 93 Misc. 171, 156 N.Y.S. 1064 (App. Term 1916).

For discussion of creation of an equitable lien by an assignment of rights, see § 22.

[4]Susi v. Belle Acton Stables, Inc., 360 F.2d 704 (2d Cir. 1966).

As to bailment agreements, generally, see N.Y. Jur. 2d, Bailments and Chattel Leases §§ 1 et seq.

[Section 7]

[1]Denier v. Bonewur, 134 A.D. 577, 119 N.Y.S. 313 (2d Dep't 1909).

[2]People v. Keeffe, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 405 N.E.2d 1012 (1980).

Hudson v. Swan, 83 N.Y. 552, 1881 WL 12769 (1881).

A lienor has a special property interest in the object of his lien that, for example, is sufficient to support a prosecution for larceny where the owner of such property wrongfully takes it from him. People ex rel. Travis v. Sheriff of Cortland County, 275 A.D. 444, 90 N.Y.S.2d 848 (3d Dep't 1949).

§ 8 Effect on lien of bankruptcy

Research References

West's Key Number Digest, Liens ⚷1

A trustee in bankruptcy takes the bankrupt's estate subject to all valid claims, liens, and equities, and these, in the absence of federal statutes, are to be determined by state law.[1] A chattel mortgagee gives a lien that may be enforced against the trustee in bankruptcy of the mortgagor if the transaction is free from fraud, based upon an actual consideration, and recorded or filed as required by the local law.[2] Similarly, since a judgment is, by operation of law, a lien on real property, it survives bankruptcy, and purchasers take subject to lien.[3]

B. CREATION AND ATTACHMENT OF LIENS

Research References

West's Key Number Digest

Liens ⚷2, 2.1, 5, 7, 8

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Secured Transactions
West's A.L.R. Digest, Liens ⚷2, 2.1, 5, 7, 8

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 11 to 56
C.J.S., Liens §§ 10 to 24

Treatises and Practice Aids

Bowmar, Lien Priorities in New York § 3:21

Trial Strategy

Avoidance and Recovery of Fraudulent Transfers, 25 Am. Jur. Proof of Facts 3d 591

[Section 8]

[1]Archibald v. Panagoulopoulos, 233 N.Y. 478, 135 N.E. 857 (1922) (equitable lien).

Swartz, Inc., v. City of Utica, 223 A.D. 506, 228 N.Y.S. 660 (4th Dep't 1928), aff'd, 254 N.Y. 555, 173 N.E. 864 (1930) (attorney's lien).

Vanderlip v. Walker, 144 Misc. 629, 259 N.Y.S. 289 (Sup 1932).

[2]Sprague v. Glynn, 136 Misc. 163, 238 N.Y.S. 696 (Sup 1930).

As to security interests under the Uniform Commercial Code, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

[3]Leonard v. Brescia Lumber Corp., 174 A.D.2d 621, 571 N.Y.S.2d 322 (2d Dep't 1991).

Holdsworth v. Maxey, 53 A.D.2d 853, 385 N.Y.S.2d 366 (2d Dep't 1976) (judgment creditor by failing to specifically refer in notice of claim to debt and judgment entered thereon as secured did not waive security as embodied in judgment).

For discussion of judgment liens, generally, see N.Y. Jur. 2d, Judgments §§ 160 to 188.

Forms

Am. Jur. Legal Forms 2d §§ 165:6 to 165:8, 165:10, 165:12, 165:19 to 165:24, 165:27, 165:29
Am. Jur. Pleading and Practice Forms, Liens §§ 5, 48
New York Forms Legal and Business §§ 16A:19, 16A:20

1. In General

§ 9 Creation of lien by property owner

Research References

West's Key Number Digest, Liens ⚷2, 2.1
New York Forms Legal and Business § 16A:20 (Notice to legal owner of services requested by another—Consent of owner to services and creation of lien attached)

A lien generally can be created only by the owner of property—or by some person authorized by him or her[1] —by contract,[2] either expressly or by implication, or by some positive rule of law, such as by statute, and no one has a lien upon the property of another with whom he or she deals unless it is conferred in such a manner.[3]

◆ **Definition:** The term "owner" includes the owner in fee of real property, or of a less estate therein; a lessee for a term of years; a vendee in possession under a contract for the purchase of such real property; and all persons having any right, title, or interest in such real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment; and all persons having any right or franchise granted by a public corporation to use the streets and public places thereof, and any right, title or interest in and to such franchise.[4]

◆ **Illustrations:** Retention of the plaintiff's vehicle by the defendants pending payment of a rust-proofing charge could not be justified on basis of an asserted lien where, at time of the request and rendition of service, the plaintiff was a purchaser as opposed to an owner.[5] Additionally, where the plaintiff neither requested nor

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[Section 9]

[1]Am. Jur. 2d, Liens § 12.

As to liens for the improvement of real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

[2]Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

As to liens created by contract, generally, see §§ 17, 18.

[3]Jordan v. National Shoe & Leather Bank, 74 N.Y. 467, 1878 WL 12681 (1878).

Kozlowski v. Briggs Leasing Corp., 96 Misc. 2d 337, 408 N.Y.S.2d 1001 (Sup 1978).

As to equitable liens created by express contract or implication, see §§ 15 to 22.

[4]Lien Law § 2(3).

[5]Slank v. Sam Dell's Dodge Corp., 46 A.D.2d 445, 363 N.Y.S.2d 138 (4th

consented to the storage of a vehicle, it cannot incur any liability for the storage charges by reason of the bailee's assertion of a lien.[6]

The purchaser of real property at a statutory or judicial sale is deemed the owner thereof from the time of sale. If such purchaser fails to complete the purchase pursuant to the terms of the sale, all subsequent liens on the property created by his or her consent are liens on any deposit made by him or her and not on the real property.[7]

§ 10 Effect of right to repossess

Research References

West's Key Number Digest, Liens ⟜2, 2.1

Since a person may not have a lien on property of which he or she is already the owner,[1] the mere exercise of a reserved right to repossess does not create a lien upon the property of a third party.[2] Title retained only for security purposes in property delivered to another, as in the case of a conditional sale, does not create a lien therein although treated like one for some purposes,[3] such as enforcement by action. A contract of conditional sale of personal property is deemed a lien upon a chattel.[4]

In general, a lien that depends upon possession is not created where the parties agree that the owner is to have the right to take and use his or her property periodically or at pleasure during the term of the contract.[5] However, once the lien has been created, the mere temporary surrender of possession does not necessarily destroy the

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Dep't 1975).

[6]O'Connor v. B. J. Auto Make Ready Corp., 101 Misc. 2d 665, 421 N.Y.S.2d 758 (N.Y. City Civ. Ct. 1979), judgment modified on other grounds, 115 Misc. 2d 575, 455 N.Y.S.2d 164, 35 U.C.C. Rep. Serv. 725 (App. Term 1982).

[7]Lien Law § 2(3).

As to real property foreclosures and sales, generally, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 891.

[Section 10]

[1]§ 9.

[2]John W. Snyder, Inc., v. Aker, 134 Misc. 721, 236 N.Y.S. 28 (Sup 1929) (conditional sale).

As to recovery of a chattel, generally, see N.Y. Jur. 2d, Conversion and Action for Recovery of Chattel §§ 89 to 245.

[3]Bishop v. Spector, 150 Misc. 360, 269 N.Y.S. 76 (Sup 1932).

As to security interests and conditional sales transactions, generally, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

[4]Lien Law § 206.

For discussion of enforcement by action to foreclose, generally, see §§ 77 to 103.

[5]Smith v. O'Brien, 46 Misc. 325, 94 N.Y.S. 673 (Sup 1905), aff'd, 103 A.D. 596, 92 N.Y.S. 1146 (1st Dep't 1905).

The exception is the statutory lien of an owner of a self-storage facility, discussed at § 35.

lien.[6]

2. Common-Law Possessory Lien

§ 11 Generally

Research References

West's Key Number Digest, Liens ⚷5

Am. Jur. Legal Forms 2d § 165:27 (Notice of lien—Attorney's services); § 165:29 (Notice of lien and of sale—Personal property—General form for non-statutory lien)

Am. Jur. Pleading and Practice Forms, Liens § 48 (Complaint, petition, or declaration—Allegation—Lien claimants' possession of property as satisfying prerequisite to establishment of common-law lien)

At common law, liens attached exclusively to personal property.[1] A common-law lien is the right to retain possession of all or some[2] personal property belonging to another until some debt due on or secured by such property is paid or satisfied.[3] For example, an attorney has a general possessory-retaining lien, established by common law, that allows retention of a client's papers or assets until his or her legal fee is paid.[4] It is indispensable that the person claiming a common-law lien have independent and exclusive possession of the property[5] and that such possession is properly acquired or retained.[6]

[6]§ 48.

[Section 11]

[1]Am. Jur. 2d, Liens § 19.

[2]Wiles Laundry Co. v. Hahlo, 105 N.Y. 234, 11 N.E. 500 (1887).

[3]Jordan v. National Shoe & Leather Bank, 74 N.Y. 467, 1878 WL 12681 (1878).

Loftus v. Carlton, 164 A.D. 879, 148 N.Y.S. 556 (1st Dep't 1914).

Goldwater v. Mendelson, 170 Misc. 422, 8 N.Y.S.2d 627 (Mun. Ct. 1938).

[4]Spinello v. Spinello, 70 Misc. 2d 521, 334 N.Y.S.2d 70 (Sup 1972).

As to attorneys' liens, generally, see N.Y. Jur. 2d, Attorneys at Law §§ 278 to 328.

[5]Deeley v. Dwight, 132 N.Y. 59, 30 N.E. 258 (1892).

In re Site for Low-Rent Housing Project, Borough of Manhattan, City of New York (Gov. Alfred E. Smith Houses, Project No. N.Y.S. 25), 193 Misc. 399, 83 N.Y.S.2d 689 (Sup 1948).

[6]Danzer v. Nathan, 145 A.D. 448, 129 N.Y.S. 966 (2d Dep't 1911).

A lender did not have a "common-law" lien against a garden apartment unit in a building owned by a residential cooperative corporation, given that the corporation repaid $650,000 of funds advanced by the lender in connection with the corporation's settlement of litigation that resulted in the corporation's ownership of the unit, and the remainder of the lender's claim was never reduced to a docketed judgment and was unliquidated and disputed by the corporation and its directors. McDaniel v. 162 Columbia Heights Housing Corporations, 21 Misc. 3d 244, 863 N.Y.S.2d 346, 66 U.C.C. Rep. Serv. 2d 508 (Sup 2008).

As to the right of a lienor to recover liened property, generally, see § 7.

For discussion of recovery of liened property, generally, see N.Y. Jur. 2d,

The common-law lien is lost by a voluntary surrender of possession[7] though in limited circumstances the lienor may enforce the lien by extrajudicial sale.[8]

§ 12 Effect of statute; nonpossessory liens

Research References

West's Key Number Digest, Liens ⚷5

A lien that is created by statute is limited by the terms of the statute. Where the legislature has enlarged and defined a common-law lien, its definition supersedes that of the courts, and a court's exercise of power in connection with that lien thereafter must be consistent with the statute.[1] For instance, the common-law rule that liens have priority in the order of their acquisition may be changed by statute in specific cases awarding priority in the order of filing or registration.[2] However, liens that may be established under common-law principles are not invalidated merely because they are not expressly validated by the enforcement provisions of the Lien Law,[3] inasmuch as the enforcement of liens by extrajudicial sale or foreclosure is apparently applicable even to liens that are recognized only under the common law.[4]

Particular liens allowed by the common law in favor of persons such as innkeepers,[5] common carriers and warehousemen,[6] and bailees employed to change, repair, or do work on some article[7] are now the subject of statutes defining, modifying, enlarging, or extending them

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Conversion, and Action for Recovery of Chattel §§ 89 to 245.

[7]§ 48.

[8]Loftus v. Carlton, 164 A.D. 879, 148 N.Y.S. 556 (1st Dep't 1914).

As to enforcement by extrajudicial sale, generally, see §§ 59 to 76.

[Section 12]

[1]Robinson v. Rogers, 237 N.Y. 467, 143 N.E. 647, 33 A.L.R. 1291 (1924) (attorney's lien).

Liens given by statute or other rule of law for services or materials are specifically excluded from those rights and transactions governed by the secured transaction article of the Uniform Commercial Code. U.C.C. § 9-109(d)(2).

For discussion of security interests, generally, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

For discussion of statutory liens, generally, see §§ 23 to 38.

[2]Booth v. Bunce, 33 N.Y. 139, 1865 WL 4017 (1865).

As to priority, generally, see §§ 39 to 44.

[3]§§ 53 to 58.

[4]§ 58.

[5]N.Y. Jur. 2d, Hotels, Motels, and Restaurants §§ 128 to 132.

[6]N.Y. Jur. 2d, Documents of Title §§ 132 to 149.

[7]N.Y. Jur. 2d, Bailments and Chattel Leases §§ 103 to 106.

to some degree.[8] An attorney's retaining lien upon money, papers, and securities belonging to his or her client is an example of a common-law lien still recognized by the courts.[9] The common-law lien of a pledgee is statutory so far as a collateral-loan broker, or pawnbroker, is concerned.[10] A safe-deposit company is entitled to a lien on a deposit to the same extent as a warehouseperson.[11] Other particular possessory liens, some of them with common-law antecedents, are defined by statute.[12]

3. Equitable Lien

a. In General

§ 13 Generally

Research References

West's Key Number Digest, Liens ⚷7

Building and construction contracts: contractor's equitable lien upon percentage of funds withheld by contractee or lender, 54 A.L.R.3d 848

◆ **National Background:** Although equitable liens are not recognized in some states, they are in most jurisdictions and are held to have survived the enactment of the Uniform Commercial Code. Although the tendency in some states is to restrict them, they generally are looked upon with favor, and in many jurisdictions, the doctrine of equitable liens has been liberally extended to give effect to the intention of the parties to create specific charges and to facilitate mercantile transactions.[1] In New York, the doctrine of equitable liens has been liberally extended to give effect to the intentions of the parties to create specific charges upon property.

An equitable lien is a right, not recognized at law, to have a fund, specific property, or its proceeds[2] applied in whole or in part to the

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[8]Goldwater v. Mendelson, 170 Misc. 422, 8 N.Y.S.2d 627 (Mun. Ct. 1938).

For discussion of statute creating nonpossessory liens, see § 27.

As to liens for artisans, throwsters of silk, laborers on stone, and providers of services on motion-picture films, see §§ 28 to 30.

[9]N.Y. Jur. 2d, Attorneys at Law §§ 278 to 328.

[10]N.Y. Jur. 2d, Banks and Financial Institutions § 978.

[11]N.Y. Jur. 2d, Banks and Financial Institutions § 283.

[12]For example, U.C.C. § 7-307 confers upon carriers a specific lien, defines its coverage, and generally states the carrier's rights.

As to a detailed discussion of carriers, see N.Y. Jur. 2d, Carriers §§ 1 et seq.

[Section 13]

[1]Am. Jur. 2d, Liens § 33.

[2]Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985) (where a defendant's promise that her husband's debt would be paid from the proceeds of the sale of their home did not create an equitable lien upon the home itself).

payment of a particular debt or class of debts.[3] An equitable lien is neither an estate or property in the thing itself, nor a right to recover it.[4] It may not be the basis of a possessory action but is merely a charge upon the property itself.[5] Where property is held by one person subject to an equitable lien, the lienor can enforce it by a proceeding in equity.[6] Possession of the property charged is not essential to the creation and attachment of an equitable lien[7] unlike the common-law lien that is conditioned upon possession.[8] Additionally, an equitable lien may be created in after-acquired property.[9]

§ 14 Pleading and proof

Research References

West's Key Number Digest, Liens ⚷7

In deciding whether a plaintiff has sufficiently pleaded a cause of action to impress an equitable lien, the court is bound to accept every allegation set forth in the complaint as true regardless of whether the plaintiff would ultimately prevail on the merits. Defects in a complaint in an action seeking to impress an equitable lien upon certain real property may be remedied by affidavits and other documentary evidence submitted.[1]

The lienholder has the burden of proof on any factual issues, the resolution of which is necessary to determine the validity and propriety of the purported lien.[2] No particular formality is essential in the creation of an equitable lien, but, because equity will enforce a lien where it is clear to the court that the intent of the parties was to

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As to the necessity of designating the specific property to which an equitable lien is intended to attach, see § 18.

As to attorneys' lien, generally, see N.Y. Jur. 2d, Attorneys at Law §§ 278 to 328.

[3]Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

[4]Hovey v. Elliott, 118 N.Y. 124, 23 N.E. 475 (1890).

[5]Hovey v. Elliott, 118 N.Y. 124, 23 N.E. 475 (1890).

For discussion of conversion and actions to recover a chattel, see N.Y. Jur. 2d, Conversion, and Action for Recovery of Chattel §§ 1 et seq.

[6]§ 54.

[7]McCoy v. American Exp. Co., 253 N.Y. 477, 171 N.E. 749 (1930).

An equitable lien may be imposed upon a seat on the New York Stock Exchange after the requirements of the Exchange have been satisfied. In re Gruner, 295 N.Y. 510, 68 N.E.2d 514, 167 A.L.R. 628 (1946).

[8]§ 11.

[9]§ 4.

[Section 14]

[1]Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

[2]Gibor Associates v. City of New York, 91 Misc. 2d 915, 399 N.Y.S.2d 84 (Sup 1977).

As to statutory liens, generally, see §§ 23 to 38.

give such a lien or impose a charge upon specific property,[3] it is necessary that the intention to create such a charge clearly appear from the language and the attendant circumstances. Strict proof of such intention is required.[4]

b. Creation of Equitable Lien

§ 15 Generally

Research References

West's Key Number Digest, Liens ⇔7

An equitable lien may be created by a contract, express[1] or implied,[2] indicating a clear intention that specific property is to be held, given, or transferred as security for an obligation.[3] Mere expectation, however sincere, is insufficient to establish an equitable lien.[4] No particular form, language, or formality is essential in the creation of an equitable lien[5] because equity looks to the intent, not the form.[6] Where the intent is found, and no paramount rights intervene, equity will enforce the intent. In such cases, equity merely gives effect to the clear agreement of the parties and treats as done that which the parties intended to be done.[7] An equitable lien may be created where an attempt to make a legal mortgage failed for want of some formality[8]

[3]§ 15.

[4]Pennsylvania Oil Products Refining Co. v. Willrock Producing Co., 267 N.Y. 427, 196 N.E. 385 (1935).

Conkling v. First Nat. Bank of Olean, 286 A.D. 537, 145 N.Y.S.2d 682 (4th Dep't 1955).

Castelli v. Walton Lake Country Club, 112 N.Y.S.2d 179 (Sup 1952).

An agreement between drawer and drawee of a foreign bill of exchange for security to the latter in the form of another bill on another drawee would not alone as matter of law charge a debt owed by the second drawee with a lien. Muller v. Kling, 149 A.D. 176, 133 N.Y.S. 614 (1st Dep't 1912), aff'd, 209 N.Y. 239, 103 N.E. 138 (1913).

[Section 15]

[1]§ 17.

[2]§ 19.

[3]M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd., 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009).

James v. Alderton Dock Yards, 256 N.Y. 298, 176 N.E. 401 (1931).

Ryan v. Cover, 75 A.D.3d 502, 904 N.Y.S.2d 750 (2d Dep't 2010).

Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S.2d 591 (3d Dep't 2006).

Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

[4]M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd., 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009).

Scivoletti v. Marsala, 61 N.Y.2d 806, 473 N.Y.S.2d 949, 462 N.E.2d 126 (1984).

[5]In re Friedlander's Estate, 178 Misc. 65, 32 N.Y.S.2d 991 (Sur. Ct. 1941).

[6]Fiore v. Smith, 96 N.Y.S.2d 610 (Sup 1950).

[7]N.Y. Jur. 2d, Equity § 88.

[8]Payne v. Wilson, 74 N.Y. 348, 1878 WL 12662 (1878).

In re Friedlander's Estate, 178

or where a party attempts to give a mortgage or a lien,[9] or a contract pledging property,[10] or an agreement to hold property as security for a debt to another.[11] However, an agreement, either by parol or in writing to pay a debt out of a designated fund does not operate to create an equitable lien upon the fund, or operate as an equitable assignment of it.[12]

◆ **Illustrations:** In an action to foreclose on a mortgage, the bank was not entitled to the imposition of an equitable lien on the proceeds of a settlement received by the defendant homeowners as result of a lawsuit against the contractor and architect arising from serious structural defects in home since: (1) the mortgage did not extend the bank's lien against the property to recovery by the homeowners in an action against the contractor and architect; (2) there was no provision in the mortgage that could be construed to create an intent on the part of the homeowners that settlement of any lawsuit by the homeowners against third parties that related to the home would inure to the benefit of the bank; (3) the homeowners were under no duty to restore the property to the same condition as when the mortgage was executed; and (4) there was no evidence that the present value of the property did not exceed the amount owed on the mortgage.[13] A promise of the building manager that the construction company would be paid out of rents and profits collected during a foreclosure action was not enforceable, and would not create the necessary security interest to support an equitable lien, where the manager had no power to make such a promise without court approval, the manager neither sought nor obtained such approval, and the company itself did not seek such approval.[14] Finally, in the absence of evidence that specific property was being given to secure an obligation, the parties had no lien encumbering the plaintiff's tools, equipment, and vehicles as required to support

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Misc. 65, 32 N.Y.S.2d 991 (Sur. Ct. 1941).

[9]Coats v. Donnell, 94 N.Y. 168, 1883 WL 12738 (1883).

In re Friedlander's Estate, 178 Misc. 65, 32 N.Y.S.2d 991 (Sur. Ct. 1941).

[10]Chase v. Peck, 21 N.Y. 581, 1860 WL 7877 (1860).

Thorne Real Estate, Inc. v. Nezelek, 100 A.D.2d 651, 473 N.Y.S.2d 82 (3d Dep't 1984) (no express or implied contract concerning specifically identified or identifiable property sufficient to establish existence of an equitable lien).

[11]McCoy v. American Exp. Co., 253 N.Y. 477, 171 N.E. 749 (1930).

As to the creation of equitable mortgages, see N.Y. Jur. 2d, Mortgages and Deed of Trust §§ 20 to 22.

[12]NYCTL 1999-1 Trust v. N.Y. Pride Holdings, Inc., 68 A.D.3d 952, 892 N.Y.S.2d 418 (2d Dep't 2009).

[13]Albany Sav. Bank, F.S.B v. Novak, 151 Misc. 2d 956, 574 N.Y.S.2d 140 (Sup 1991).

[14]Security Pacific Mortg. and Real Estate Services, Inc. v. Republic of Philippines, 962 F.2d 204, 22 Fed. R. Serv. 3d 883 (2d Cir. 1992) (applying New York law).

an equitable lien.[15]

§ 16 Necessity of agreement to create lien

Research References

West's Key Number Digest, Liens ⚷7

Am. Jur. Legal Forms 2d § 165:21 (Notice of lien—Health care provider—Lien against cause of action of person injured); § 165:22 (Notice of lien—Hospital lien—Lien against cause of action of person injured); § 165:23 (Notice of lien—Hospital lien for emergency services—Notice to responsible party)

In order to impose an equitable lien, there must be an agreement that the property in question will be held as security for an obligation.[1] Generally, courts should not permit a party to assert an equitable lien in a case that is essentially one for money owed as the party has an adequate remedy at law to collect the debt.[2] Although parties may agree to the creation of a lien that equity will enforce,[3] in the absence of a statute or a transaction creating a lien, or of circumstances from which the court can hold on equitable principles that specific property should be charged in order to prevent the perpetration of a wrong, equity will refuse to recognize a lien unless an agreement therefor is established.[4] However, there are instances where equity will enforce a lien upon property without an agreement of the parties, as where there might otherwise be no relief to the injured party, and where the one claiming the lien has made advancements of money for the purchase, preservation, or enhancement of the property.[5] Equitable liens may be recognized in surplus money proceedings.[6] A lien that might otherwise be implied from an agreement is negatived if inconsistent with the express terms or the clear intent of the contract

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[15]Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S.2d 591 (3d Dep't 2006).

[Section 16]

[1]IMS Engineers-Architects, P.C. v. State, 51 A.D.3d 1355, 858 N.Y.S.2d 486 (3d Dep't 2008).

Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S.2d 591 (3d Dep't 2006).

Matco Elec. Co., Inc. v. Plaza Del Sol Const. Corp., 82 A.D.2d 979, 440 N.Y.S.2d 407 (3d Dep't 1981).

[2]Miller v. Marchuska, 31 A.D.3d 949, 819 N.Y.S.2d 591 (3d Dep't 2006).

[3]Castelli v. Walton Lake Country Club, 112 N.Y.S.2d 179 (Sup 1952).

As to enforcement of equitable liens, generally, see § 54.

[4]Hampton Bottlers v. Distributors Consol. Corp., 38 N.Y.S.2d 236 (Sup 1942).

For discussion of creation of an equitable lien by implication, see § 19.

[5]In re Friedlander's Estate, 178 Misc. 65, 32 N.Y.S.2d 991 (Sur. Ct. 1941).

[6]Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

between the parties.[7]

◆ **Illustrations:** An equitable lien will not be imposed upon property for plaintiff asserting joint ownership where, upon purchase, the plaintiff ordered his name stricken from the deed and title placed strictly in the name of his wife to insulate his family against possible downturns in his fortunes as a gambler.[8] Similarly, a lender that provided a bridge loan to a borrower in connection with the refinancing of the borrower's townhouse was not entitled to an equitable lien after the mortgagee foreclosed on the property; although the lender alleged that it made the loan in exchange for a security interest in the property, a letter contemporaneous with the transaction stated that any mortgage on the property was to be in favor of another entity.[9] Additionally, a health insurance plan, providing that if the insured were repaid for all or some of its medical expenses by another source, the insurer "will have the right to a refund" from the insured, did not give rise to an equitable lien in favor of the insurer as to that portion, if any, of proceeds of settlement of the insured's personal injury action that represented covered medical payments since the plan did not identify the property subject to the right of refund, it did not describe the property in such way as to make identification possible, and it did not state the parties' intention that the property be held, given, or transferred as security for the obligation.[10] Moreover, the promise of a building manager that the construction company would be paid out of rents and profits collected during a foreclosure action, whether written or parol, did not operate to create an equitable lien on such rents and profits, even if the manager could have made the promise absent court approval, where the original contract between the company and the manager failed to designate any property in which the company would obtain a security interest; the contract between the construction company and the building owner was insufficient to support a claim by the company for an equitable lien on the building's rents and profits, even though the company fully performed, where the terms of the contract in no way identified the building, or rents and profits generated by the building, as security for payment for the work performed.[11]

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[7]§ 19.

[8]Macina v. Macina, 94 A.D.2d 791, 463 N.Y.S.2d 43 (2d Dep't 1983), order aff'd, 60 N.Y.2d 691, 468 N.Y.S.2d 463, 455 N.E.2d 1258 (1983).

[9]M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd., 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009).

[10]Teichman by Teichman v. Community Hosp. of Western Suffolk, 87 N.Y.2d 514, 640 N.Y.S.2d 472, 663 N.E.2d 628 (1996).

[11]Security Pacific Mortg. and Real Estate Services, Inc. v. Republic of Philippines, 962 F.2d 204, 22 Fed. R. Serv. 3d 883 (2d Cir. 1992) (applying New York law).

§ 17 Creation by express contract

Research References

West's Key Number Digest, Liens ⟹7

New York Forms Legal and Business § 16A:20 (Notice to legal owner of services requested by another—Consent of owner to services and creation of lien attached)

Where an equitable lien is created by an express contract, the contract should:

- deal with a debt or obligation, liquidated or unliquidated, running in favor of one of the contracting parties and against the other
- be concerned with particularly described property or a fund, existing or to come into being, adequately defined therein and referable to the debt or obligation
- contain language indicating that the owner of the property or fund clearly intended that the property or fund was to be held, given, or transferred as security for the debt or obligation[1]

◆ **Illustrations:** An agreement to pay a debt out of a designated fund does not operate to create an equitable lien on the fund.[2] Additionally, a subsequent lienor has no right to any part of the fund deposited for the purpose of discharging the plaintiff's lien.[3] However, a borrower's expressed covenant to secure all proceeds of its assets as collateral for the debit gave the lender an equitable lien against the collateral and all proceeds thereof.[4]

§ 18 Creation by express contract—Designation or appropriation of property

Research References

West's Key Number Digest, Liens ⟹7

Am. Jur. Legal Forms 2d § 165:10 (Repair contract provision—Authorization for lien and sale on nonpayment of repair charges)

New York Forms Legal and Business § 16A:19 (Repair contract provision—Authorization for lien and sale on nonpayment of charges)

The essence of an equitable lien created by express contract is that

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[Section 17]

[1]Fiore v. Smith, 96 N.Y.S.2d 610 (Sup 1950).

[2]Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

[3]Teitelbaum v. Watford Estates, 18 N.Y.S.2d 343 (App. Term 1940).

[4]Bank of India v. Weg and Myers, P.C., 257 A.D.2d 183, 691 N.Y.S.2d 439, 38 U.C.C. Rep. Serv. 2d 996 (1st Dep't 1999).

specific property is to be held, given, or transferred as security.[1] The contract must contain language particularly describing the property or a fund referable to the debt or obligation.[2] The existence of an equitable lien requires specifically identified or identifiable property,[3] and the designation of the specific property to which it is to attach is essential to the creation of an equitable lien.[4] However, an agreement, verbal or written, to pay a debt out of a designated fund does not give an equitable lien upon the fund.[5] For example, a promise that a debt will be paid from the proceeds of the sale of real property does not create an equitable lien upon the property.[6]

§ 19 Creation by implication

Research References

West's Key Number Digest, Liens ⚷7

An equitable lien may be implied in the clear intention that specific property is to be held, given, or transferred as security for an obligation.[1] However, no lien will be implied where it would be inconsistent with the express terms of a contract between the parties.[2]

Circumstances in which an equitable lien is created by implication include:

- an advancement of money for the purchase, preservation, or enhancement of the property[3]
- real property subject to a tax lien subject to a condemnation

[Section 18]

[1]Authorized Credit Corp. v. Enterprise Indus. Co., 109 N.Y.S.2d 687 (City Ct. 1951).

[2]§ 17.

[3]Thorne Real Estate, Inc. v. Nezelek, 100 A.D.2d 651, 473 N.Y.S.2d 82 (3d Dep't 1984).

[4]Lighthouse v. Third Nat. Bank, 162 N.Y. 336, 56 N.E. 738 (1900).

A preclosing possession agreement under which purchasers paid the real estate taxes before the vendor cancelled the contract of sale did not make any sums paid pursuant to the agreement; an equitable lien on the property as the agreement merely provided for the repayment of taxes in the event title failed to close. Kaya v. B & G Holding Co., LLC, 48 A.D.3d 521, 853 N.Y.S.2d 95 (2d Dep't 2008).

[5]James v. Alderton Dock Yards, 256 N.Y. 298, 176 N.E. 401 (1931).

Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

Thorne Real Estate, Inc. v. Nezelek, 100 A.D.2d 651, 473 N.Y.S.2d 82 (3d Dep't 1984).

[6]Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

[Section 19]

[1]§ 15.

[2]Wiles Laundry Co. v. Hahlo, 105 N.Y. 234, 11 N.E. 500 (1887).

Thorne Real Estate, Inc. v. Nezelek, 100 A.D.2d 651, 473 N.Y.S.2d 82 (3d Dep't 1984) (contract between the parties to have the property stand as security).

[3]§ 21.

proceeding[4]
- a conveyance of real property without any security in reliance upon consideration being rendered[5]
- a conveyance, with knowledge, of real estate secured by a purchase-money mortgage, for funds held in trust for an infant[6]
- an erroneous application by a clerk of payments of taxes to the wrong property[7]
- a subcontract with the bidder for property on a partition sale[8]
- the moving by defendants of estate property from its original location to a new one, mingling the stock and fixtures with their own, selling a part of it, purchasing new stock with the proceeds of the sale, and so confusing the remainder that it could not be identified and separated[9]

§ 20 Creation by implication—Property insured for benefit of creditor or third person

Research References

West's Key Number Digest, Liens ⚷7

Circumstances in which an equitable lien is created by implication include an agreement by the owner, notwithstanding that the policy proceeds are made payable to himself or herself, to insure property for the benefit of a creditor.[1]

◆ **Illustrations:** Where an insured agrees to insure for the protection and indemnification of a third person having an interest in the subject of insurance, such third person has an equitable lien, in case of loss, upon the money due under the policy to the extent of such interest.[2] Additionally, the seller of restaurant held an equitable lien in fire insurance proceeds to the extent of the seller's security inter-

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[4]In re Mill Creek Phase 1 Staten Island Bluebelt System, 38 A.D.3d 665, 831 N.Y.S.2d 532 (2d Dep't 2007), rev'd on other grounds, 10 N.Y.3d 898, 861 N.Y.S.2d 605, 891 N.E.2d 721 (2008).

[5]Payne v. Wilson, 74 N.Y. 348, 1878 WL 12662 (1878).

[6]Mann v. Benedict, 47 A.D. 173, 62 N.Y.S. 259 (3d Dep't 1900).

[7]Baranowski v. Wetzel, 174 A.D. 507, 161 N.Y.S. 153 (2d Dep't 1916).

[8]Bowen v. Horgan, 237 A.D. 832, 261 N.Y.S. 163 (2d Dep't 1932).

[9]Klinzing v. Blauw Bros., 160 N.Y.S. 631 (Sup 1916).

[Section 20]

[1]Cromwell v. Brooklyn Fire Ins. Co., 44 N.Y. 42, 1870 WL 7784 (1870).

Rath v. Aerovias Interamericanas De Panama, 205 Misc. 135, 127 N.Y.S.2d 231 (Sup 1953).

As to the rights of creditors to assert liens on insurance proceeds, generally, see N.Y. Jur. 2d, Insurance §§ 2290 to 2293.

[2]Schleimer v. Empire Mut. Ins. Co., 65 Misc. 2d 520, 318 N.Y.S.2d 182 (N.Y. City Civ. Ct. 1971), judgment rev'd on other grounds, 71 Misc. 2d 1014, 337

est in the premises, and the insurer was liable to the seller for the proceeds that the insurer paid to the purchaser under the purchaser's insurance policy after ignoring the seller's notice to the insurer of its equitable stake; although the insurer had no duty to investigate the legitimacy of the seller's claim, the insurer had an obligation, when confronted with apparently conflicting claims, to preserve the insurance proceeds for the rightful owner, which it could accomplish by way of an interpleader action.[3]

However, a secured creditor may not recover proceeds from the insurer of the transferee of secured property, absent an agreement between the transferee and the lienholder, notwithstanding an agreement by the transferor, his or her assigns, and transferees to insure for the creditor, since one who has a lien only on the insured property has no claim to insurance proceeds in the event of a loss of the property.[4]

§ 21 Creation by implication—Advancement for improvement or purchase of real property

Research References

West's Key Number Digest, Liens ⚷7

Avoidance and Recovery of Fraudulent Transfers, 25 Am. Jur. Proof of Facts 3d 591

An equitable lien may result from proof of the expenditure of money in the improvement of real property[1] by a person in a confidential relationship to the owner[2] or proof of an intention that the premises be held as security for the obligation.[3] However, a plaintiff is not

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N.Y.S.2d 872 (App. Term 1972), order aff'd, 43 A.D.2d 825, 352 N.Y.S.2d 429 (1st Dep't 1974).

[3]Burns v. Burns, 84 N.Y.2d 369, 618 N.Y.S.2d 761, 643 N.E.2d 80 (1994).

[4]McGraw-Edison Credit Corp. v. All State Ins. Co., 62 A.D.2d 872, 406 N.Y.S.2d 337, 24 U.C.C. Rep. Serv. 767 (2d Dep't 1978).

[Section 21]

[1]Farr v. Covert, 34 A.D.3d 1204, 824 N.Y.S.2d 515 (4th Dep't 2006).

Merrihew v. Parrott, 168 A.D. 704, 154 N.Y.S. 747 (3d Dep't 1915).

Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

For discussion of statutory liens for improvements upon real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

[2]Leary v. Corvin, 181 N.Y. 222, 73 N.E. 984 (1905).

Farr v. Covert, 34 A.D.3d 1204, 824 N.Y.S.2d 515 (4th Dep't 2006).

Petrukevich v. Maksimovich, 1 A.D.2d 786, 147 N.Y.S.2d 869 (2d Dep't 1956).

Billson Housing Corp. v. Harrison, 26 Misc. 2d 675, 205 N.Y.S.2d 387 (Sup 1960).

[3]Conkling v. First Nat. Bank of Olean, 286 A.D. 537, 145 N.Y.S.2d 682 (4th Dep't 1955).

Di Niscia v. Olsey, 162 A.D. 154, 147 N.Y.S. 198 (2d Dep't 1914).

entitled to an equitable lien for her labor and services in improving property in the absence of an express or implied promise to convey an interest in the property to the plaintiff.[4]

◆ **Illustrations:** The plaintiff was not entitled to an equitable lien or a constructive trust on property, notwithstanding contributions to its maintenance for 30 years, where the record did not indicate any implied promise to convey, reimburse, or to grant a lesser interest in property.[5] Additionally, the plaintiff was not entitled to recovery on the theory of equitable lien where he claimed that he loaned money to his former business partner to whom defendant was then married, that the money was used to improve real property now owned by the defendant after her husband's death, and that the defendant stated that her husband's debt would be paid from the proceeds of the sale of the property since an agreement to pay the debt out of the designated fund does not operate to create an equitable lien on the fund.[6] However, where a relation of confidence has been abused, and a person has never had title to the property but has expended money in its improvement on the basis of an oral promise to convey which money does not constitute the entire consideration for the purchase of the interest claimed, that person is entitled to an equitable lien thereon for the amount expended.[7] Similarly, a person who advances a portion of the consideration for the purchase of property is entitled to an equitable lien for the amount advanced.[8] Finally, in an action to impose a constructive trust on real property, the court should have awarded the plaintiffs an equitable lien for the amounts they expended in repairing the defendants' home while believing that the defendants would deed the house to them rather than an amount representing the increase in value of the defendants' home.[9]

Billson Housing Corp. v. Harrison, 26 Misc. 2d 675, 205 N.Y.S.2d 387 (Sup 1960).

For discussion of proof of intention to establish an equitable lien, generally, see § 14.

As to the similarity between an equitable lien on real property and a constructive trust, see § 2.

[4]Lester v. Zimmer, 197 A.D.2d 783, 602 N.Y.S.2d 711 (3d Dep't 1993).

[5]Scivoletti v. Marsala, 61 N.Y.2d 806, 473 N.Y.S.2d 949, 462 N.E.2d 126 (1984).

[6]Datlof v. Turetsky, 111 A.D.2d 364, 489 N.Y.S.2d 353 (2d Dep't 1985).

[7]Petrukevich v. Maksimovich, 1 A.D.2d 786, 147 N.Y.S.2d 869 (2d Dep't 1956).

McCarthy v. McCarthy, 284 A.D. 813, 132 N.Y.S.2d 194 (2d Dep't 1954), judgment aff'd, 308 N.Y. 1035, 127 N.E.2d 868 (1955).

Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

[8]Rella v. Torrioni, 235 N.Y.S.2d 462 (Sup 1962).

[9]Jacone v. DeRosa, 173 A.D.2d 525 570 N.Y.S.2d 302 (2d Dep't 1991).

§ 22 Creation by assignment of rights

Research References

West's Key Number Digest, Liens ⇨7

An assignment of rights is considered an equitable lien.[1] The assignment of a future interest in the proceeds of a claim is an equitable lien only and does not become a legal lien until the proceeds have come into existence.[2] A recorded agreement by a tenant-in-common, recipient of money provided by a county social services unit, to repay the county by creation of a lien upon specifically designated property, which states that all subsequent deeds, mortgages, or other documents are not to be valid or effective until the county is paid, is an assignment of the recipient's proceeds in his or her interest in the property and a valid lien thereon.[3] However, the ripening of an equitable lien into a legal lien does not relate back to the date of the execution of the original assignment creating the equitable interest.[4]

4. Statutory Lien

a. In General

§ 23 Generally

Research References

West's Key Number Digest, Liens ⇨8

Statutory liens may be legislative enactments of common-law liens[1] or liens that did not exist at common law, such as the mechanic's lien.[2] Many of the accepted common-law possessory liens have been made the subject of statutory definition with varying degrees of modification, extension, or limitation.[3] The Lien Law provides for numerous others, including liens—

[Section 22]

[1]Lacaille v. Feldman, 44 Misc. 2d 370, 253 N.Y.S.2d 937 (Sup 1964).

[2]U.S. v. Colby Academy, 524 F. Supp. 931 (E.D. N.Y. 1981) (applying New York law).

[3]Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

[4]U.S. v. Colby Academy, 524 F. Supp. 931 (E.D. N.Y. 1981) (applying New York law).

As to the priority of equitable liens, generally, see § 42.

[Section 23]

[1]Horace Waters & Co. v. Gerard, 189 N.Y. 302, 82 N.E. 143 (1907) (overruled on other grounds by, Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 347 N.Y.S.2d 170, 300 N.E.2d 710 (1973)) (innkeeper's lien).

As to the effect of statute on the common law of liens, generally, see § 12.

[2]N.Y. Jur. 2d, Mechanics' Liens §§ 1 et seq.

[3]§ 12.

— on vessels.[4]
— on monuments, gravestones, and cemetery structures.[5]
— of hotel, apartment hotel, inn, and boarding, rooming, and lodging housekeepers.[6]
— of manufacturers and throwsters of silk goods.[7]
— of bailees for hire for work upon watches, clocks, or jewelry.[8]
— of warehousepersons and carriers.[9]
— of motion-picture film laboratories.[10]
— of hospitals.[11]
— of garagepersons.[12]
— for labor on railroads.[13]
— for labor on stone.[14]
— for service of stallions or bulls.[15]
— for work by artisans on personal property.[16]
— under contracts for public improvements.[17]

§ 24 Constitutional limitations; possessory liens

Research References

West's Key Number Digest, Liens ⚷8

It is within the power of the legislature, subject to constitutional limitations, to provide for liens to secure the payment of debts and other obligations.[1] Liens created by statute are ordinarily governed by and find their efficacy within the provisions of their foundation, and their validity is entirely dependent on the terms of the statute.[2] However, a State may not authorize the taking of any significant property interest without giving the owner prior notice and a hearing unless the State provides other statutory safeguards sufficient to protect the owner against a mistaken deprivation of his or her

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[4]N.Y. Jur. 2d, Boats, Ships, and Shipping §§ 132 to 146.

[5]N.Y. Jur. 2d, Cemeteries and Dead Bodies §§ 32 to 34.

[6]N.Y. Jur. 2d, Hotels, Motels, and Restaurants §§ 128 to 132.

[7]§ 33.

[8]N.Y. Jur. 2d, Bailments and Chattel Leases §§ 103 to 106.

[9]N.Y. Jur. 2d, Documents of Title §§ 132 to 149.

[10]§ 31.

[11]N.Y. Jur. 2d, Hospitals and Related Health Care Facilities §§ 221 to 231.

[12]N.Y. Jur. 2d, Garages, Filling, and Parking Stations §§ 79 to 96.

[13]N.Y. Jur. 2d, Mechanics' Liens §§ 9, 10, 58.

[14]§ 34.

[15]N.Y. Jur. 2d, Animals § 18.

[16]§§ 28 to 30.

[17]N.Y. Jur. 2d, Mechanics' Liens § 10.

[Section 24]

[1]Am. Jur. 2d, Liens § 53.

[2]Am. Jur. 2d, Liens § 54.

property.[3] A statutory lien does not violate the provisions of the state and federal constitutions, providing that no person is deprived of property rights without due process of law, that is, notice and opportunity to be heard.[4]

The constitutionality of the statutory possessory lien has been upheld,[5] inasmuch as the possessory nature of the lien that a lienor has on a property until his or her charges are satisfied does not constitute state action sufficient to trigger the protections afforded by the due-process clause of the state constitution.[6] However, the enactment of substantive provisions of law that authorize a creditor to bypass the courts to carry out the foreclosure sale encourages him or her to adopt this procedure rather than to rely on the more cumbersome methods that might comport with constitutional due-process guaranties.[7] A statute that creates a lien and permits a person to summarily seize property of another for satisfaction of a debt cannot be said to serve an important governmental or general public interest.[8] Since a possessory lien is merely a security interest, the State may not constitutionally permit a lienor to extinguish the owner's interest without adhering to minimum due-process standards.[9]

§ 25 Constitutional limitations; possessory liens—Taking of property

Research References

West's Key Number Digest, Liens ⚷8

A State may not authorize the taking of any significant property

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[3]Hercules Chemical Co., Inc. v. VCI, Inc., 118 Misc. 2d 814, 462 N.Y.S.2d 129 (Sup 1983).

[4]Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

IDS Leasing Corp. v. Hansa Jet Corp., 82 Misc. 2d 741, 369 N.Y.S.2d 922 (Sup 1975), order aff'd, 51 A.D.2d 536, 377 N.Y.S.2d 639 (2d Dep't 1976).

As to the filing of a notice of lien as a taking of property, see § 25.

[5]Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

IDS Leasing Corp. v. Hansa Jet Corp., 82 Misc. 2d 741, 369 N.Y.S.2d 922 (Sup 1975), order aff'd, 51 A.D.2d 536, 377 N.Y.S.2d 639 (2d Dep't 1976).

[6]N.Y. Const. Art. I, § 6.

[7]Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

[8]Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 347 N.Y.S.2d 170, 300 N.E.2d 710 (1973).

As to enforcement of statutory liens by extrajudicial sale, see §§ 59 to 76.

[9]Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

For discussion of proceedings to determine the validity of a lien prior to extrajudicial sale, see § 62.

As to constitutional due process, generally, see N.Y. Jur. 2d, Constitutional Law §§ 387 to 433.

interest without giving the owner prior notice and a hearing unless the State provides other statutory safeguards sufficient to protect the owner against a mistaken deprivation of his or her property.[1] However, the statutory notice of lien once filed is a lien upon the property and nothing more.[2] It does not constitute a taking of property without due process inasmuch as an opportunity for an immediate hearing exists upon application either to enforce or to discharge the lien wherein the propriety of the lien and the existence of appropriate grounds therefor can be tested and a hearing directed where necessary.[3] However, the State, by authorizing the enforcement of such lien by means of an ex parte sale without first affording its owner an opportunity to be heard, has delegated to private parties functions traditionally associated with sovereignty, constituting meaningful state participation that triggers the protections afforded by that clause.[4]

§ 26 Construction of statutes

Research References

West's Key Number Digest, Liens ⚷8

The Lien Law is to be liberally construed to secure the purposes for which it was intended, particularly in the case of a lien statute that expressly provides for its liberal construction.[1] Generally, a lien provided for by a statute that is merely declaratory of the common law must be interpreted in conformity with its principles, but where the legislature has enlarged and defined a common-law lien, its definition supersedes the definition of the courts, and thereafter, the

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[Section 25]

[1]§ 24.

[2]§§ 57, 58.

[3]Gibor Associates v. City of New York, 91 Misc. 2d 915, 399 N.Y.S.2d 84 (Sup 1977).

As to the requirement that notice of sale include notice that a proceeding to challenge the lien or amount claimed may be brought, see § 69.

For discussion of proceedings to determine the validity of liens prior to extrajudicial sale, see § 62.

[4]Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

Crouse v. First Trust Union Bank, 109 Misc. 2d 89, 438 N.Y.S.2d 438, 31 U.C.C. Rep. Serv. 1494 (Sup 1981), order rev'd on other grounds, 86 A.D.2d 978, 448 N.Y.S.2d 329, 33 U.C.C. Rep. Serv. 1170 (4th Dep't 1982).

[Section 26]

[1]Fedders Central Air Conditioning Corp. v. Karpinecz & Sons, Inc., 83 Misc. 2d 720, 372 N.Y.S.2d 470, 17 U.C.C. Rep. Serv. 1377 (N.Y. City Civ. Ct. 1975).

State Ins. Fund v. Parrilla, 31 Misc. 2d 835, 225 N.Y.S.2d 236 (Mun. Ct. 1961).

For example, Lien Law § 23 provides that the laws pertaining to mechanic's liens must be construed liberally. See N.Y. Jur. 2d, Mechanics' Liens § 4.

exercise of the powers of the courts with respect to such liens must be consistent with the legislative definition.[2]

To the extent that a statute creating a lien is in derogation of the common law, the statute is subject to the rule that statutes in derogation of the common law are to be strictly construed.[3] Because the right of a garage owner to a lien for storage charges is purely statutory, and since the statute confers privileges in derogation of the common law, it must be strictly construed.[4]

§ 27 Establishing nonpossessory lien; filing and notice

Research References

West's Key Number Digest, Liens ⊙⇒8

Am. Jur. Legal Forms 2d § 165:24 (Notice of lien—Employee's contractual or statutory lien for unpaid wages—Employer in bankruptcy)

Am. Jur. Pleading and Practice Forms, Liens § 5 (Claim, statement, or notice of lien—Arising by contract—On merchandise—To secure loans and advances made by lienor to lienee)

Nonpossessory statutory liens ordinarily must be established by notice of some kind so that innocent third parties may have a measure of protection from secret liens[1] although it is possible, by the act of public authority, to create liens without physical attachment to the property affected and without filing notices in the available public offices where they may be searched out by interested parties[2] as in the case of an ordinance creating a lien for a public improvement.[3]

A lien does not come into existence unless the notice upon which it is founded substantially complies with the statute that authorized the creation of the lien.[4] For instance, the Lien Law creates a nonposses-

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[2]Am. Jur. 2d, Liens § 55.

[3]N.Y. Jur. 2d, Statutes § 177.

[4]Wyche v. New Amsterdam Garage Corp., 82 Misc. 2d 956, 371 N.Y.S.2d 754 (N.Y. City Civ. Ct. 1975).

As to garageman's lien, generally, see N.Y. Jur. 2d, Garages, Filling, and Parking Stations §§ 79 to 96.

[Section 27]

[1]Clark v. Flynn, 120 Misc. 474, 199 N.Y.S. 583 (Sup 1923).

[2]Oxford Distributing Co. v. Famous Robert's, Inc., 5 A.D.2d 507, 173 N.Y.S.2d 468 (3d Dep't 1958).

[3]Cummins v. U. S. Life Title Ins. Co. of New York, 40 N.Y.2d 639, 389 N.Y.S.2d 319, 357 N.E.2d 975 (1976) (public notice of a prospective ordinance, to provide for a special assessment of taxes upon property to pay cost of an improvement project, did not create such lien where the ordinance was never actually enacted).

As to public improvement liens, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 9 to 11.

[4]Houseknecht v. Reeve, 108 N.Y.S.2d 917 (Sup 1951).

The subsequent purchaser of an apartment building in which a dangerous condition had been found to exist by the court was not subject to liens in favor of

sory lien for labor performed on stone only upon the filing of notice of lien in compliance with the Uniform Commercial Code.[5] A positive legislative enactment prescribing the conditions essential to the existence and preservation of a statutory lien may not be disregarded, and in order to create such a lien, there should be a substantial compliance with the statute. For example, there should be a compliance with requirements as to the filing of liens and notices of liens.[6]

The filing of notice of liens does not establish the correctness or validity of the lien.[7] Additionally, even though the lien has been perfected in the manner provided by statute, a lienholder may lose the lien by delay in bringing a foreclosure action[8] or by failure to take statutory steps to keep the lien alive.[9]

Examples of statutory nonpossessory liens that must be established by notice are those on vessels,[10] cemetery structures,[11] liens of hospitals on actions for injury or death of patients,[12] and liens on animals for service or breeding fees.[13] The liens on strays and drifts are examples of liens that are possessory, yet must be established by notice.[14] The Lien Law also provides for the filing of notices of liens for taxes payable to the United States.[15]

On the other hand, some statutory liens need not be filed or recorded. For example, the Workers' Compensation Law[16] provides that compensation is a lien against the assets of the carrier or employer without limit of amount, subordinate, however, to claims for unpaid wages and prior recorded liens. Such lien need not be recorded, docketed, or filed to be effective.[17]

New York City that secured loans taken to finance repairs of the building, where New York City did not file any purchase or work orders relating to borrowed funds, as required under the provision of the New York City Housing Maintenance Code governing such liens. Rosenbaum v. City of New York, 96 N.Y.2d 468, 730 N.Y.S.2d 774, 756 N.E.2d 62 (2001).

[5] § 34.

[6] Am. Jur. 2d, Liens § 56.

[7] Becker v. Romanzo, 245 A.D. 185, 281 N.Y.S. 317 (3d Dep't 1935).

As to notice of lien and sale, see §§ 66 to 73.

For discussion of the proceeding to determine the validity of liens after notice of sale, see § 62.

[8] § 80.

[9] §§ 45 to 52.

[10] N.Y. Jur. 2d, Boats, Ships, and Shipping §§ 135 to 146.

[11] N.Y. Jur. 2d, Cemeteries and Dead Bodies §§ 32 to 34.

[12] N.Y. Jur. 2d, Hospitals and Related Health Care Facilities §§ 221 to 231.

[13] N.Y. Jur. 2d, Animals § 18.

[14] N.Y. Jur. 2d, Animals §§ 192 to 194.

[15] Lien Law § 240.

[16] WCL § 34, discussed at N.Y. Jur. 2d, Workers' Compensation § 964.

[17] Albert Pipe Supply Co. v. Callanan, 159 Misc. 547, 288 N.Y.S. 307 (App. Term 1936).

b. Artisans' Lien

§ 28 Generally

Research References

West's Key Number Digest, Liens ⚷8

Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done—modern cases, 44 A.L.R.4th 271

Am. Jur. Legal Forms 2d § 165:12 (Professional services contract provision—Right of accountant to lien on client's books); § 165:19 (Notice of lien—Artisan's common-law lien); § 165:20 (Notice of lien—Artisan's statutory lien)

New York Forms Legal and Business § 16A:20 (Notice to legal owner of services requested by another—Consent of owner to services and creation of lien attached)

At common law, a workperson who by his or her labor enhanced the value of a chattel obtained a lien upon it for the reasonable value of the work performed. That lien endowed the artisan with the exclusive right to possession of the repaired article until his or her charges were satisfied.[1] The Lien Law provides that a person who makes, alters, repairs, or performs work or services of any nature and description upon, or in any way enhances the value of, an article of personal property, at the request or with the consent of the owner, has a lien on such article, while lawfully in possession thereof, for his or her reasonable charges for the work done and materials furnished, and may retain possession thereof until such charges are paid.[2]

◆ **Definition:** The term "artisan" is generally associated with trained works, mechanics, and tradespeople.[3] A corporation may hold an artisans' lien for computer services rendered,[4] but an accountant may not assert, for services rendered, such a lien over a client's books or records.[5]

The statute, in effect and intent, is simply declaratory of the common law granting to an artisan a lien upon personal property for work done thereon with a right to retain possession of it until the lien

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[Section 28]

[1]Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 408 N.Y.S.2d 39, 379 N.E.2d 1169 (1978).

[2]Lien Law § 180.

[3]Park Place-Dodge Corp. v. Collins, 75 Misc. 2d 25, 346 N.Y.S.2d 949 (Sup 1973), order aff'd, 43 A.D.2d 910, 352 N.Y.S.2d 415 (1st Dep't 1974).

[4]American Consumer, Inc. v. Anchor Computers, Inc., 93 Misc. 2d 452, 402 N.Y.S.2d 734 (Sup 1978) (corporation that enhanced the value of tapes is entitled to artisan's lien).

[5]Park Place-Dodge Corp. v. Collins, 75 Misc. 2d 25, 346 N.Y.S.2d 949 (Sup 1973), order aff'd, 43 A.D.2d 910, 352 N.Y.S.2d 415 (1st Dep't 1974).

is discharged either by payment or proper tender. It does not enlarge in any way the common-law right.[6] One who by performance of skilled, as distinguished from common, labor has transferred the object into a thing of use by the exertion of skill acquires, by statute, a lien on the object.[7] However, an artisans' lien extends to nonskilled labor performed by the artisan prior to commencement of the actual manufacturing process, where such work is done in the ordinary course of the artisan's business and as a necessary preliminary step to the manufacturing process,[8] such as the storage and handling of goods received for enhancement of their value.[9] Possession may be retained, and an artisans' lien obtained, until charges are paid:

- where cut garments are delivered for manufacture[10]
- where computer services are performed on magnetic computer tapes, including data manipulation, modification, and assembly, that enhance the value of the computer tapes[11]
- where the petitioner, engaged to dismantle and preserve the architectural interior of a certain room, fulfilled its engagement by removing the wall panels, cornices, ceilings, leaded glass, and other parts, and numbered and properly identified them so that they could be reconstructed at some future time, and packed or crated and removed them to a warehouse[12]
- by a manufacturer of automobile truck bodies who mounts bodies upon chassis delivered to him for that purpose[13]

However, there is no artisan's lien where:

- the value of the alteration, repair, or enhancement of a press was so small that the payment therefor by the sum for which the lien was asserted or the lessened sum awarded in the judgment would be excessive[14]
- a defendant stored a piano but performed no services other than

[6] Park Place-Dodge Corp. v. Collins, 75 Misc. 2d 25, 346 N.Y.S.2d 949 (Sup 1973), order aff'd, 43 A.D.2d 910, 352 N.Y.S.2d 415 (1st Dep't 1974).

[7] Bush v. Springall, 36 N.Y.S.2d 708 (Sup 1942).

[8] Mickey's Clan, Inc. v. New York Credit Men's Adjustment Bureau, Inc., 114 Misc. 2d 926, 452 N.Y.S.2d 555 (Sup 1981).

[9] Mickey's Clan, Inc. v. New York Credit Men's Adjustment Bureau, Inc., 114 Misc. 2d 926, 452 N.Y.S.2d 555 (Sup 1981) (where completion of the work was prevented without fault of the artisan).

[10] Davidson v. Fankuchen, 88 N.Y.S. 196 (App. Term 1904).

[11] American Consumer, Inc. v. Anchor Computers, Inc., 93 Misc. 2d 452, 402 N.Y.S.2d 734 (Sup 1978).

[12] In re Harriss' Estate, 174 Misc. 34, 18 N.Y.S.2d 842 (Sur. Ct. 1940).

[13] Hare's Motors v. Fred Roeder Mfg. Co., 207 A.D. 670, 202 N.Y.S. 830 (2d Dep't 1924), aff'd, 238 N.Y. 590, 144 N.E. 904 (1924).

[14] Strauss v. Keyes, 117 N.Y.S. 951 (App. Term 1909).

the ordinary simple act of cleaning and polishing[15]

- a laborer made a claim simply for the value of labor and services "in and about the business of cutting, trimming and preparing logs to be sawed, hauling the same from wood lots"[16]

The right to possess property that is the subject of an artisan's lien, impounded by the sheriff in a creditor's action against the debtor-owner, is an integral part of the lienor's interest, and while the court has the authority to direct the disposition of the claim against the debtor, only the claim and not the property itself may be sold by the sheriff; the purchaser-lienor may then execute the lien by sale of the chattel.[17]

§ 29 Establishment and perfection of lien

Research References

West's Key Number Digest, Liens ⚷8

The Lien Law requires to establish an artisans' lien[1] that the artisan or lienor have possession of the goods over which the lien is asserted.[2]

> ◆ **Illustration:** A corporate metal fabricator, having worked on certain aluminum extrusions in accordance with a purchase order for fabrication on the understanding that after completion of the work, the extrusions and leftover scrap aluminum would be returned to the owner, has a lien upon the scrap and extrusions remaining in its possession for the reasonable charges for the work done inasmuch as where the artisan returned to the owner a portion of the property worked upon, and retains the balance, the lien attaches to the retained property to the full extent of work done on the entire order, including the portion returned.[3]

The artisans' lien is established simply by lawful possession for the purpose of performing the work for which the lien is claimed.[4] Noth-

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[15]Bush v. Springall, 36 N.Y.S.2d 708 (Sup 1942).

[16]Brackett v. Pierson, 114 A.D. 281, 99 N.Y.S. 770 (3d Dep't 1906).

[17]U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

[Section 29]

[1]Lien Law § 180.

[2]North Am. Leisure Corp. v. A & B Duplicators, Ltd., 468 F.2d 695, 11 U.C.C. Rep. Serv. 518 (2d Cir. 1972) (applying New York law).

Similarly, the liens of manufacturers and throwsters of silk goods and of motion-picture film laboratories are conditioned upon possession. See §§ 31, 33.

[3]U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972).

[4]Danzer v. Nathan, 145 A.D. 448, 129 N.Y.S. 966 (2d Dep't 1911).

ing more is required to perfect such lien.[5] Additionally, the lien is perfected by the performance of the work and continues as long as the artisan retains lawful possession of the property.[6] The burden of proof of lawful possession is on the lienor.[7]

An artisan has no lien unless his or her work was done at the request or with the consent of the owner[8] and, for example, where the plaintiff delivered her piano to a third person who delivered it to the defendant, the defendant cannot enforce a lien against the plaintiff without showing authority on the part of the third person to deliver it to the defendant.[9]

§ 30 Extent of lien

Research References

West's Key Number Digest, Liens ⚷8

The lien of an artisan extends to all goods delivered under one contract and is not confined to the particular portion on which the labor has been bestowed.[1] Where the artisan returns to the owner a portion of the property worked upon and retains the balance, the artisan's lien attaches to the retained property to the full extent of the work done on the entire order, including the portion returned.[2] The fact that the property retained by the artisan is surplus, resulting from the owner's overestimate of goods necessary for the artisan's work, which is not improved, does not eliminate the artisan's lien thereon for work done in the past so long as the property came to him or her as part of the same transaction.[3] Generally, a lien for work done on goods other than those on which the lien is asserted must be

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[5]U.S. v. Toys of the World Club, Inc., 288 F.2d 89, 94 A.L.R.2d 739 (2d Cir. 1961) (applying New York law).

[6]Lieberman v. Mulhern Steam Heating Co., 159 N.Y.S. 43 (App. Term 1916).

[7]§ 98.

[8]L.B. Repair Co. v. Whicher, 140 N.Y.S. 133 (App. Term 1913).

As to the necessity that a lien be created by the property owner, generally, see § 9.

[9]Ludwick v. Davenport-Treacy Piano Co., 112 N.Y.S. 1023 (App. Term 1908).

[Section 30]

[1]Wiles Laundry Co. v. Hahlo, 105 N.Y. 234, 11 N.E. 500 (1887).

Bauer v. Cohen, 127 A.D. 194, 111 N.Y.S. 46 (2d Dep't 1908).

North Am. Leisure Corp. v. A & B Duplicators, Ltd., 468 F.2d 695, 11 U.C.C. Rep. Serv. 518 (2d Cir. 1972) (applying New York law).

[2]U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972).

[3]U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972).

U.S. v. Toys of the World Club, Inc., 288 F.2d 89, 94 A.L.R.2d 739 (2d Cir. 1961) (applying New York law) (publisher that had been furnished paper stock under a contract for printing was entitled to a lien on the excess paper in

based on a special contract between the owner and the artisan.[4] Where garments were delivered to an artisan to perform work thereon, under circumstances that showed that the contract was not entire but that each garment was a separate transaction, the retention of some by reason of nonpayment for work done upon others that had been returned was unauthorized.[5]

The protections afforded by the Lien Law are not precluded by the copyrighted character of goods in the possession of the lienor where the person for whom the goods were made, altered, repaired, or in any way enhanced unjustifiably declines to pay the price of such service.[6] A defendant, who allegedly has artisan's lien on a vehicle, lacks standing to challenge a search of the vehicle in which vials of cocaine were seized since the possessory interest created by the lien is for the single and limited purpose of obtaining payment for work done and does not authorize the defendant's use of the vehicle.[7]

c. Other Statutory Liens

§ 31 Lien of motion-picture film laboratories

Research References

West's Key Number Digest, Liens ⚷8

The Lien Law provides for the protection of all persons, firms, or corporations engaged in the business of a motion-picture film laboratory or in the business of developing, titling, storing, assembling, or reproducing motion-picture films a lien for the services rendered for another upon positive prints and negative film from which other positive prints are made, printed, reproduced, or repaired, at the request, or with the consent or knowledge, of the owner or his or her agent.[1] Such services expressly include every case where such persons or corporations copy, print, reprint, reproduce, or in any manner prepare, at the request, with the consent, or with the knowledge of the owner or his or her agent, a positive print or prints from a motion-picture negative film.[2] No valid lien exists on motion-picture film negatives

its possession for the unpaid balance on the contract).

[4]Sheinman & Salita, Inc. v. Paraskevas, 22 Misc. 2d 436, 194 N.Y.S.2d 62 (App. Term 1959).

[5]Solomon v. Bok, 49 Misc. 493, 98 N.Y.S. 838 (App. Term 1906).

[6]Platt & Munk Co. v. Republic Graphics, Inc., 315 F.2d 847 (2d Cir. 1963) (applying New York law).

[7]People v. Ayala, 147 Misc. 2d 278, 557 N.Y.S.2d 236 (Sup 1990).

[Section 31]

[1]Lien Law § 188.

[2]Lien Law § 188.

unless positive prints have been made thereof.[3]

Possession of motion-picture film by any person who delivers the same to any motion-picture laboratory is presumptive evidence of the consent of the owner thereof to the performance of the work that may be done thereon or therefrom by such laboratory. No lien hereby granted will be waived or impaired by the taking of any note or notes for the moneys so due or for the work and labor performed and materials and moneys furnished.[4] Absent a judicial determination of the rights of the parties, a lienor for services performed on motion-picture film has no legal right to effect a sale of liened property in his or her possession.[5] Where the film owner establishes a question of fact whether the film lab agreed to defer payment for services performed until funds were payable to the owner from its distributor, the owner is entitled to injunctive relief preventing an ex parte extrajudicial sale until a litigation of the respective rights of the parties.[6] In an action by a film distributor contesting the amount owed to defendant film processors, who claimed a possessory lien in the film,[7] the defendants were directed to release the film to distributor on its filing of a surety bond or making of a cash deposit even though the Lien Law does not expressly provide for substitution of undertaking for possessory lien.[8]

§ 32 Lien of motion-picture film laboratories—Extent of lien

Research References

West's Key Number Digest, Liens ⚷8

The lien of a motion-picture film laboratory extends to distribution and exhibition rights given in such films by those parties who request, consent to, or have knowledge of the performance thereon of film

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[3]21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

Independent Film Distrib., Ltd. v. Chesapeake Industries, Inc., 250 F.2d 951 (2d Cir. 1958).

[4]Lien Law § 188.

As to waiver of lien, generally, see § 45.

[5]Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853, 414 N.Y.S.2d 596 (Sup 1979).

[6]Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853, 414 N.Y.S.2d 596 (Sup 1979).

As to sale under statute, in enforcement of liens, generally, see §§ 59 to 76.

As to proceedings to determine the validity of the lien or the amount claimed, see § 62.

[7]Pursuant to Lien Law §§ 180, 188.

[8]Angelika Films, Inc. v. Urban Entertainment Associates, Inc., 140 Misc. 2d 408, 530 N.Y.S.2d 979 (Sup 1988) (defendants thereby would be fully protected on their claims and to permit them to retain possession of prints until final disposition of action unless they were paid full amount allegedly owing would give them unfair advantage).

laboratory services[1] and is intended to ensure the payment of the cost of the services performed, including storage charges,[2] insurance, cost of containers, and any money advanced in connection with the developing, printing, reproducing, and preparing of such films, whether negative or positive.[3] The lien is on positive films copied, printed, reprinted, reproduced, or prepared, and to any and all negative or positive prints or films of such owner, lessee, licensee, mortgagee, or conditional vendee in their possession, including the distribution and exhibition rights therein of all such persons, firms, and corporations aforesaid.[4] These distribution and exhibition rights apply to a negative film only when the laboratory has made a positive print or prints from the negative film, and then the lien attaches to both the positive prints and the negative film.[5] Once a positive print of motion-picture film is made, the lien extends to any and all other negative or positive prints of films in the lienor's possession, not merely those upon which work has been performed.[6]

◆ **Illustrations:** A motion-picture film laboratory was entitled, upon serving proper notice, to sell 12 films submitted for positive prints as payment for past work performed on another film.[7] However, another case provides that no lien on a negative film, accompanied by a lien on the right of distribution and exhibition, can attach until positive prints are made by the laboratory from the negative.[8]

§ 33 Lien of manufacturer or throwster of silk goods

Research References

West's Key Number Digest, Liens ⟹8

All persons or corporations engaged in the business of manufacturing, spinning, or throwing silk into yarn or other goods are entitled to a lien upon the goods and property of others in their possession for the amount of any account that may be due them, from the owners of such silk, by reason of any work and labor performed, and materials

[Section 32]

[1]Lien Law § 188.

[2]21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

[3]Lien Law § 188.

[4]Lien Law § 188.

[5]Independent Film Distrib., Ltd. v. Chesapeake Industries, Inc., 250 F.2d 951 (2d Cir. 1958).

[6]21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

[7]21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

[8]Independent Film Distrib., Ltd. v. Chesapeake Industries, Inc., 250 F.2d 951 (2d Cir. 1958) (applying New York law).

furnished in or about the manufacturing, spinning, or throwing of the same, or other goods, of such owner or owners. Such lien may not be waived or impaired by the taking of any note or notes for the moneys so due, or for the work and labor performed and materials furnished.[1]

§ 34 Lien for labor on stone; notice of lien

Research References

West's Key Number Digest, Liens ⚷8

A person employed in a quarry, mine, yard, or dock at excavating, quarrying, mining, dressing, or cutting sandstone, granite, cement stone, limestone, bluestone, or marble may have a lien on such stone for the amount due for the labor expended thereon.[1] However, this lien does not attach to any material that becomes a part of any building or structure, or has ceased to be the property of the person for whom the labor was performed.[2]

Inasmuch as nonpossessory statutory liens ordinarily must be established by notice of some kind so that innocent third parties may have a measure of protection,[3] the statute provides that a lien for labor on stone is established by filing a notice of lien with the Secretary of State in compliance with the Uniform Commercial Code requirement to perfect a security interest in such stone.[4] This notice must be filed within 30 days after the completion of such labor and must state the:

- amount due therefor
- name and residence of the lienor
- name of the person for whom the labor was performed
- quantity and description of the stone against which the claim is made[5]

The notice must be marked, filed, and indexed by the filing officer in the same manner as a financing statement and the same fees charged therefor. In addition, a copy of the notice so filed must be served upon the owner of the stone or upon the person in charge of the quarry,

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[Section 33]

[1]Lien Law § 185.

[Section 34]

[1]Lien Law § 140.

[2]Lien Law § 141.

[3]§ 27.

[4]Lien Law § 140, referring to U.C.C. § 9-501(a)(2).

For discussion of security interests, including the properly filed lien for labor performed on stone, enforceable as a lien upon chattel, see § 83.

As to the filing requirements to perfect a security interest, generally, under the Uniform Commercial Code, see N.Y. Jur. 2d, Secured Transactions §§ 181 to 236.

[5]Lien Law § 140.

mine, yard, or docks wherein the services were performed, within five days after the filing of the notice.[6]

If the labor upon such sandstone, cement stone, granite, bluestone, limestone, or marble is performed for a contractor under a contract with the owner of such quarry, mine, yard, or dock, the owner is not liable to pay by reason of all the liens filed against such quarry, mine, yard, or dock a greater sum than the amount unpaid upon such contract at the time of filing such notices, or, in case there is no contract, than the aggregate amount unpaid of the value of labor and services performed.[7]

§ 35 Lien of owner of self-storage facility

Research References

West's Key Number Digest, Liens ⚷8

The owner of a self-storage facility has a lien upon all personal property stored in such facility, for occupancy fees and other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to law, or any other charges pursuant to the occupancy agreement.[1] The lien attaches as of the date the personal property is brought to the facility for storage and is superior to any other lien or security interest.[2]

◆ **Illustrations:** The operator of a self-storage facility in which a stolen automobile is stored has a lien on the contents of the storage unit, including the stolen car, since the Lien Law does not distinguish stolen property from other property in creation of the lien and since the Uniform Commercial Code,[3] which excludes stolen property from a warehousepersons' lien, does not govern the self-service storage facility owner's claim for storage expenses.[4] Similarly, the lessor of a storage unit who sold a lessee's property that was stored in the unit, after the lessee defaulted on rent and moved without notifying the lessor of a new address, did not violate the Lien Law, where the lease agreement provided that the lessor had the right to sell the lessee's property if the lessor defaulted on his rent, and the lessor tried three times unsuccessfully to serve the lessee with notice of default by certified mail, and the lessor twice noticed a public sale in

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[6]Lien Law § 140.

[7]Lien Law § 141.

[Section 35]

[1]Lien Law § 182(6).

[2]Lien Law § 182(6).

As to enforcement of statutory liens, see §§ 57, 58.

[3]U.C.C. § 7-209.

[4]E-Z Self Storage, Inc. v. Aetna Cas. & Sur. Co., 132 Misc. 2d 357, 503 N.Y.S.2d 690, 1 U.C.C. Rep. Serv. 2d 1297 (City Ct. 1986).

a newspaper.[5] On the other hand, a personal property storage company did not properly notice the sale of a customer's property under the Lien Law, and thus, the company was liable for any damages resulting from the sale where the notices allegedly sent by the company to the customer did not include an itemized statement of the amount due, a description of the property subject to the lien, the nature of the proposed sale, a conspicuous statement that unless the claimant paid within an allotted time the goods would be advertised for sale and sold, a statement that any person claiming an interest in the goods was entitled to bring a proceeding within 10 days of service of the notice if he disputed the validity of the lien or the amount claimed.[6] Also, in an action to recover the value of goods stored in a self-service storage facility, the plaintiff was properly limited to $1,000 recovery where he had exclusive control of the storage space, and under the terms of the written storage agreement, which conformed to the applicable statute,[7] he covenanted that the value of the goods stored would not exceed $1,000 and agreed that the storage facility operator had no duty to secure the stored property.[8]

§ 36 Lien for arrears and past-due support

Research References

West's Key Number Digest, Liens ⚷8

Am. Jur. Legal Forms 2d § 165:6 (Agreement—Creating lien on personal property—In favor of public welfare agency); § 165:7 (Agreement—Creating lien on real and personal property—In favor of public welfare agency); § 165:8 (Agreement—Lien against cause of action—In favor of public welfare agency)

The State Office of Temporary and Disability Assistance, or local social services district, or its authorized representative on behalf of persons receiving services, has a lien against personal property owned by a support obligor when the support obligor is under a court order to pay child support or combined child and spousal support to a support collection unit, and such support obligor has accumulated support arrears/past-due support in an amount equal to or greater than the amount of current support due for a period of four months. Such lien is in an amount sufficient to satisfy such support arrears/past-due support. Said lien must be perfected in case of a vehicle with the Department of Motor Vehicles. The filing of a notice of lien or of a

[5]Seaforth v. Public Storage Management, Inc., 288 A.D.2d 368, 733 N.Y.S.2d 228 (2d Dep't 2001).

[6]Anderson v. Pods, Inc., 70 A.D.3d 820, 896 N.Y.S.2d 88 (2d Dep't 2010).

[7]Lien Law § 182.

[8]Ross v. Tuck-It-Away, Inc., 180 A.D.2d 428, 579 N.Y.S.2d 92 (1st Dep't 1992).

release of lien must be completed without payment of fee and may be done by electronic means.[1] The State must accord full faith and credit to liens that arise in another state when such state agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to such liens, as is appropriate. Such rules may not require judicial notice or hearing prior to enforcement of such a lien, and enforcement will be governed by Article 9 of the Lien Law.[2] For purposes of determining whether a support obligor has accumulated support arrears/past-due support for a period of four months, the amount of any retroactive support, other than periodic payments of retroactive support that are past due, may not be included in the calculation of arrears/past-due support. However, if at least four months of support arrears/past-due support has accumulated subsequent to the date of the court order, the entire amount of any retroactive support may be collected.[3]

§ 37 Lien for arrears and past-due support—Against real and personal property under the Social Services Law

Research References

West's Key Number Digest, Liens ⇐8
Bowmar, Lien Priorities in New York § 3:21

The State Office of Temporary and Disability Assistance, or a local social services district, or its authorized representative has a lien against real and personal property owned by a support obligor when such support obligor is under a court order to pay child support or combined child and spousal support to a support collection unit on behalf of persons receiving services,[1] and such obligor has accumulated support arrears/past due in an amount equal to or greater than the amount of current support due for period of four months. Such lien incorporates unpaid support that accrues in the future.[2]

When the Office of Temporary and Disability Assistance, or social services district, or its authorized representative on behalf of person receiving services determines that the requisite amount of child support is past due, it must send, by first-class mail, a notice of intent to file a lien to the support obligor.[3] Filing of the notice of the lien must

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[Section 36]

[1]Lien Law § 211(1).

[2]Lien Law § 211(2).

[3]Lien Law § 211(3); SSL § 111-u(2).

[Section 37]

[1]Under SSL §§ 111-y, 111-z.

[2]SSL § 111-u(1).

[3]SSL § 111-u(3).

be as provided[4] or as otherwise authorized by law.[5] The obligor may assert a mistake of fact and must have the opportunity to make a submission in support of the assertion. The assertion and any supporting papers must be submitted within 35 days from the date a notice was mailed. Thereafter, the social services district must determine the merits of the assertion and must notify the obligor of its determination within 90 days after notice to obligor was mailed.[6] If the social services district finds no mistake of fact exists, or the obligor fails to assert a mistake of fact within 35 days, the social services district may file a notice of lien, which must contain the caption of the support order and a statement of arrears and that constitutes a lien on the property. The social services district may not enforce its lien until after the expiration of any applicable period for review of an administrative action, or if the obligor has initiated an Article 78 proceeding,[7] until completion of such review.[8] Within five days before or 30 days after filing the notice of the lien, the social services district must send by first-class mail a copy of such notice upon the owner of the property.[9]

§ 38 Lien on dies, molds, forms, and patterns

Research References

West's Key Number Digest, Liens ⚷8

Molders have a lien, dependent on possession, on all dies, molds, forms, or patterns in their hands belonging to a customer, for the balance due them from such customer for any manufacturing or fabrication work, and in the value of all material related to such work. Such lien does not have priority over any security interest in the die, mold, form, or pattern that is perfected at the time the molder acquires the lien. The molder may retain possession of the die, mold, form, or pattern until the charges are paid.[1]

Before enforcing such a lien, notice in writing must be given to the customer and to the holder of a perfected security interest either delivered personally or sent by registered mail to the last-known address of the customer or holder of a perfected security interest. This notice must state that a lien is claimed for the damages set forth in or attached to such writing for manufacturing or fabrication work contracted and performed for the customer. Notice to the customer

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[4] In Lien Law §§ 65, 211; VTL §§ 2101 et seq. (Art. 46).

[5] SSL § 111-u(5).

[6] SSL § 111-u(3).

[7] CPLR 7801 et seq. (Art. 78).

[8] SSL § 111-u(4).

[9] SSL § 111-u(6).

[Section 38]

[1] Lien Law § 151.

must also include a demand for payment.[2]

◆ **Definition:** A "molder" means any individual or entity who fabricates, casts, or otherwise makes or uses a die, mold, form, or pattern for the purpose of manufacturing, assembling, casting, fabricating, or otherwise making a product or products for a customer. A "molder" includes, but is not limited to, a tool or die maker.[3] A "customer" means any individual or entity who causes a molder to fabricate, cast, or otherwise make a die, mold, form, or pattern or who provides a molder with a die, mold, form, or pattern to manufacture, assemble, cast, fabricate, or otherwise make a product or products for a customer.[4]

II. PRIORITIES OF LIEN

Research References

West's Key Number Digest

Liens ⚷7, 8, 12

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Secured Transactions
West's A.L.R. Digest, Liens ⚷7, 8, 12

Legal Encyclopedias

Am. Jur. 2d, Bankruptcy §§ 1235 to 1244; Federal Tax Enforcement §§ 244 to 272; Liens §§ 68 to 75
C.J.S., Liens §§ 27, 28

Forms

Am. Jur. Legal Forms 2d § 165:41
Am. Jur. Pleading and Practice Forms, Liens §§ 45, 78

§ 39 Generally

Research References

West's Key Number Digest, Liens ⚷12
Am. Jur. Pleading and Practice Forms, Liens § 78 (Judgment or decree—Provision—Establishing existence and priority of lien)

As a general rule, common-law liens, which arise by operation of law upon considerations of justice and policy, as distinguished from liens created by contract or statute, attach to the property itself, without any reference to ownership, and override all other rights in

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[2]Lien Law § 152.

[3]Lien Law § 150(2).

[4]Lien Law § 150(1).

the property.[1] The common-law rule with respect to the priority of liens is that the first in time is the first in right,[2] and, in the absence of any statutory alteration of the common law or where a statute creating a lien fails to address priority, the common-law rule still controls.[3]

In determining which claim is superior, it must be ascertained which lien attached first to the disputed property and whether any lien takes precedence as a matter of public policy since irrespective of the dates particular liens come into existence, if one is of a type preferred over the others, that factor must control.[4] Further, the parties may agree among themselves as to the order of priority of liens.[5] A judgment lien and a mortgage lien stand upon the same footing as regards the real property that is the sole asset from which a judgment lien or mortgage may be satisfied.[6]

◆ **Illustrations:** An instrument entitled "Assignment of Proceeds of Real Property" executed by a public assistance recipient in a lien on her interest in real property, duly recorded, has priority in a surplus money proceeding of a foreclosure action over a junior and subsequently recorded mortgage executed by recipient and her husband in favor of a bank.[7] Additionally, in an action commenced after the defendant mortgagor was discharged in bankruptcy wherein the bank sought to foreclose on a mortgage obtained in connection with the defendant's purchase of a "qualified leasehold condominium" (in which each unit's ownership is based on a ground lease between the sponsor and the public authority rather than a fee

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[Section 39]

[1]Peter Barrett Mfg. Co. v. Wheeler, 212 N.Y. 90, 105 N.E. 811 (1914).

Conklin v. Long, 18 A.D.2d 246, 239 N.Y.S.2d 193 (4th Dep't 1963).

[2]Metropolitan Life Ins. Co. v. U.S., 9 A.D.2d 356, 194 N.Y.S.2d 168 (1st Dep't 1959).

City and County Sav. Bank v. Oakwood Holding Corp., 88 Misc. 2d 198, 387 N.Y.S.2d 512 (Sup 1976).

[3]Morawski v. Gaunay, 22 A.D.2d 745, 253 N.Y.S.2d 330 (3d Dep't 1964).

Long Island Ins. Co. v. S & L Delicatessen, 102 Misc. 2d 853, 424 N.Y.S.2d 849 (Sup 1980).

As to the effect of statute on priority of liens, see § 40.

For discussion of the effect of statute on the common law of liens, generally, see § 12.

[4]Spinello v. Spinello, 70 Misc. 2d 521, 334 N.Y.S.2d 70 (Sup 1972) (particularly where no express statute or recording scheme dictates a contrary order of enforcement).

[5]Cummins v. U. S. Life Title Ins. Co. of New York, 40 N.Y.2d 639, 389 N.Y.S.2d 319, 357 N.E.2d 975 (1976).

[6]Dime Sav. Bank of Brooklyn v. Beecher, 23 A.D.2d 297, 260 N.Y.S.2d 500 (2d Dep't 1965), order aff'd, 18 N.Y.2d 763, 274 N.Y.S.2d 901, 221 N.E.2d 561 (1966).

For a discussion of priority of liens as affecting mortgages, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 224 to 249.

[7]Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

simple estate), the bank's interest as first mortgagee took priority over the sponsor's lien for common charges and the public authority's lien for past-due rent under the ground lease, and the sponsor's lien for common charges took priority over the public authority's lien for past rent under the condominium lease since the ground lease and the Condominium Act both provided that "common charges" included the unit owner's proportionate share of the ground lease rent.[8] Finally, in a surplus money proceeding following a foreclosure and sale, the referee properly gave preference to two judgments entered against married mortgagors with the remainder, if any, to be divided into two equal shares with the first share representing the wife's equity of redemption to go directly to her, and the second share used to satisfy a third judgment which was entered only against the husband, with any surplus from that share going to the successor-in-interest to the husband's equity of redemption.[9]

§ 40 Statutory liens

Research References

West's Key Number Digest, Liens ⚷8, 12

Am. Jur. Legal Forms 2d § 165:41 (Notice of sale to satisfy lien—Carrier's lien)

Statutory liens are subject to all other existing rights in the property,[1] inasmuch as lien priorities are not strictly matters of statutory creation and concern but instead are governed in the first instance by the common law.[2] However, the common-law rule that first in time is

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[8]Dime Sav. Bank of New York, F.S.B. v. Pesce, 217 A.D.2d 299, 636 N.Y.S.2d 747 (1st Dep't 1995), aff'd, 93 N.Y.2d 939, 693 N.Y.S.2d 66, 715 N.E.2d 93 (1999) (the Court of Appeals concluding on appeal that the first mortgage on the qualified leasehold condominium unit, which was held by a lender that had financed purchase of unit, had priority over a claim for past-due ground rent by a municipal authority that owned land on which condominium stood).

[9]Adirondack Trust Co. v. Snyder, 136 Misc. 2d 159, 518 N.Y.S.2d 337 (Sup 1987).

[Section 40]

[1]Peter Barrett Mfg. Co. v. Wheeler, 212 N.Y. 90, 105 N.E. 811 (1914).

Conklin v. Long, 18 A.D.2d 246, 239 N.Y.S.2d 193 (4th Dep't 1963).

Although it is possible for a public authority to create liens without physical attachment to the property affected and without filing notice in the available public offices where it may be searched out by interested parties, such liens cannot wipe out the property rights in existing liens, and probably could not, with regard to due process, take priority over the subsequently created liens of judgment creditors and other lienees acting in good faith without notice. Oxford Distributing Co. v. Famous Robert's, Inc., 5 A.D.2d 507, 173 N.Y.S.2d 468 (3d Dep't 1958).

[2]City and County Sav. Bank v. Oakwood Holding Corp., 88 Misc. 2d 198, 387 N.Y.S.2d 512 (Sup 1976).

A carriers' lien is subordinate to

first in right[3] may be changed by statute in specific cases awarding priority in order of filing or registration.[4]

A statute creating a nonpossessory lien, such as the lien for labor upon stone, may require the filing of notice of such lien in compliance with the filing requirements of the Uniform Commercial Code[5] to perfect a security interest.[6] Where a statute expressly decrees that one lien has preference over another, regardless of the order in which they are filed, the common law is to that extent displaced.[7] The Lien Law may expressly provide that a particular lien is superior to any other lien or security interest as in the case of the lien of a self-service storage facility.[8] The artisans' lien has priority over a chattel mortgage, or security interest,[9] as does the carriers' lien,[10] and over the lien of a seller under a conditional sales contract.[11] By statute, one lien may also be expressly subordinated to another as in the case of a hospital lien that is subsequent to an attorney's lien on the amount recovered in a personal-injury or wrongful-death action.[12]

The Lien Law also specifically provides that a lien on dies, molds, forms, or patterns does not have priority over any security interest in the die, mold, form, or pattern that is perfected at the time the molder acquires the lien.[13]

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lien of chattel mortgage previously recorded inasmuch as no statute provides a different priority. Morawski v. Gaunay, 22 A.D.2d 745, 253 N.Y.S.2d 330 (3d Dep't 1964).

[3]§ 39.

[4]Booth v. Bunce, 33 N.Y. 139, 1865 WL 4017 (1865).

As to the requirement that a statutory lien be filed and recorded to effect notice, see § 27.

[5]U.C.C. § 9-501(a)(2).

[6]Lien Law § 140.

As to the priority of Uniform Commercial Code security interests, generally, as against statutory liens, see § 41.

For discussion of security interests, including the lien for labor upon stone, as liens upon chattel for purposes of an action for foreclosure, see § 83.

[7]City and County Sav. Bank v. Oakwood Holding Corp., 88 Misc. 2d 198, 387 N.Y.S.2d 512 (Sup 1976).

[8]Lien Law § 182(6).

[9]Manufacturers Trust Co. v. Stehle, 1 A.D.2d 471, 151 N.Y.S.2d 384 (1st Dep't 1956).

A.I. Pedersen Co. v. Imperial Export Trading Corp., 174 Misc. 118, 19 N.Y.S.2d 9 (Sup 1940).

An artisan's lien on a taxpayer's paper stock in its possession was held superior to a federal lien for taxes thereafter assessed against the taxpayer. U.S. v. Toys of the World Club, Inc., 288 F.2d 89, 94 A.L.R.2d 739 (2d Cir. 1961).

[10]N.Y. Jur. 2d, Documents of Title §§ 132 to 149.

[11]Smith v. Pierce-Arrow Sales Corporation, 224 A.D. 769, 230 N.Y.S. 194 (2d Dep't 1928).

Dealer Plan Corp. v. Automotive Wholesalers, Inc., 9 Misc. 2d 1052, 164 N.Y.S.2d 516 (App. Term 1957).

[12]Lien Law § 189(7), discussed at N.Y. Jur. 2d, Attorneys at Law § 312.

[13]Lien Law § 151, discussed at § 38.

§ 41 Statutory liens—Security interests

Research References
West's Key Number Digest, Liens ⚷12

Under the Uniform Commercial Code, a possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.[1] If the statute creating the possessory lien is silent as to its priority relative to a security interest, this section provides a rule of interpretation that the possessory lien takes priority even if the statute has been construed judicially to make the possessory lien subordinate.[2]

> ◆ **Definition:** As used by the statute, a "possessory lien" means an interest, other than a security interest or an agricultural lien that secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business, which is created by statute or rule of law in favor of the person, and whose effectiveness depends on the person's possession of the goods.[3]

For example, if the lienor, subsequent to 30 days from the accrual of such lien, allows the motor vehicle, motor boat, or aircraft out of his or her actual possession, the lien statutorily provided for becomes void as against all security interests, whether or not perfected, in such motor vehicles, motor boat, or aircraft and executed prior to the accrual of such lien, notwithstanding possession of such motor vehicle, motor boat, or aircraft is thereafter acquired by such lienor.[4]

If a person in the ordinary course of his or her business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or the U.C.C. Article governing leases unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.[5] Other statutory provisions govern the priority of liens arising by attachment or levy

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[Section 41]

[1]U.C.C. § 9-333(b).

For a detailed discussion of U.C.C. Article 9, see N.Y. Jur. 2d, Secured Transactions §§ 1 et seq.

[2]Official Comment to U.C.C. § 9-333.

[3]U.C.C. § 9-333(a).

[4]Lien Law § 184(1), as discussed at N.Y. Jur. 2d, Garages, Parking, and Filling Stations § 79.

[5]U.C.C. § 2-A-306, discussed at N.Y. Jur. 2d, Bailments and Chattel Leases § 153.

on, security interests in, and other claims to goods under the article[6] governing leases of personal property.[7]

§ 42 Equitable liens

Research References

West's Key Number Digest, Liens ⚩7, 12

The rule that the lien that is prior in time is prior in right[1] does not apply if the junior lien is legal and was acquired without notice of a prior equitable lien[2] since, in accordance with the equitable maxim that equity follows the law, legal liens are favored against mere equitable interests.[3] A recorded lien will prevail over the subsequently recorded equitable lien since the public policy behind the requirement for prompt recording would be hindered if the equitable lien were to prevail. An equitable lien, in the form of an undocketed judgment in favor of a judgment creditor, which is prior in time to a legal lien in the form of a docketed judgment in favor of a second-judgment creditor, does not enjoy priority with respect to surplus money following a mortgage-foreclosure sale. Although a legal lien is favored as against a mere equitable interest, parties enjoying a lien upon real property are entitled to share in surplus money regardless of whether their lien is legal or equitable.[6]

A valid legal lien is entitled to precedence over an equitable

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[6]U.C.C. §§ 2-A-101 et seq.

[7]U.C.C. § 2-A-307, discussed at N.Y. Jur. 2d, Bailments and Chattel Leases § 153.

[Section 42]

[1]§ 39.

[2]Kovacs v. New York Property Ins. nderwriting Ass'n, 101 Misc. 2d 244, 420 N.Y.S.2d 837 (Sup 1979).

As to equitable liens, generally, as distinct from common-law and statutory liens, see §§ 13 to 22.

[3]Marine Midland Bank, N.A. v. A & M Warehouse, Inc., 118 Misc. 2d 555, 461 N.Y.S.2d 200 (Sup 1983).

See, however, Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979), where a duly recorded agreement by a tenant-in-common expressly creating a lien upon her interest in the property and stating that all subsequent deeds, mortgages, or other documents signed by her were not to be valid or effective was a valid lien against the debtor's interest in the property and had priority over a subsequent mortgage executed and delivered by both tenants-in-common in the same property.

Kovacs v. New York Property Ins. Underwriting Ass'n, 101 Misc. 2d 244, 420 N.Y.S.2d 837 (Sup 1979).

[5]Marine Midland Bank, N.A. v. A & M Warehouse, Inc., 118 Misc. 2d 555, 461 N.Y.S.2d 200 (Sup 1983).

[6]Marine Midland Bank, N.A. v. A & M Warehouse, Inc., 118 Misc. 2d 555, 461 N.Y.S.2d 200 (Sup 1983).

As to disposition of proceeds upon sale of property in satisfaction of lien, see § 64.

assignment.[7] Persons who furnish labor and materials may have an equitable claim, which may arise from work done on personal, as well as real property, to be paid ahead of general creditors.[8]

§ 43 Government liens; federal priority

Research References

West's Key Number Digest, Liens ⚷12

Am. Jur. Pleading and Practice Forms, Liens § 45 (Complaint in federal court—Diversity of citizenship—For declaration of lien priority and for foreclosure on real property)

Federal law governs in a dispute as to the priority of a lien of the United States over other competing liens and, absent a statutory direction to the contrary, the first in time is the first in right.[1] Congress has given priority to the payment of an indebtedness owing to the United States out of the effects of an insolvent,[2] but this does not create a lien upon the debtor's property in favor of the United States. It merely confers a right of payment out of that property. A claim of the United States within the scope of the statute has priority as against a preexisting inchoate lien but not as against specific and perfected liens.[3]

◆ **Illustration:** An agency, acting in its sovereign authority, enjoys a prerogative right to priority in the payment of debts owed to it unless it is displaced either by some express statutory provision or by a specific prior lien of another creditor of the same debtor. There being no such statutory provision applicable and no indication that any of the other creditors to the conservatee had a specific prior lien, the Office of Mental Health was entitled to priority in the payment of its claim against the conservatee.[4]

To be choate, a lien must be definite in three respects: (1) the identity of the lienor; (2) the property subject to the lien; and (3) the

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[7]Bankers Trust Co. v. Equitable Life Assur. Soc. of U.S., 19 N.Y.2d 552, 281 N.Y.S.2d 57, 227 N.E.2d 863 (1967) (tax lien).

Lacaille v. Feldman, 44 Misc. 2d 370, 253 N.Y.S.2d 937 (Sup 1964).

For discussion of priorities of equitable assignments, generally, see N.Y. Jur. 2d, Assignments §§ 78 to 82.

[8]In re Industrial Laundry Machinery Co., 3 A.D.2d 843, 161 N.Y.S.2d 547 (2d Dep't 1957).

[Section 43]

[1]Dime Sav. Bank of Brooklyn v. Beecher, 23 A.D.2d 297, 260 N.Y.S.2d 500 (2d Dep't 1965), order aff'd, 18 N.Y.2d 763, 274 N.Y.S.2d 901, 221 N.E.2d 561 (1966).

[2]31 U.S.C.A. § 3713.

[3]N.Y. Jur. 2d, Creditors' Rights and Remedies § 207.

[4]Application of Gallucci, 87 A.D.2d 818, 448 N.Y.S.2d 767 (2d Dep't 1982).

amount of the lien.[5] An artisan's lien upon goods in its possession belonging to a delinquent taxpayer is superior to a federal lien for taxes assessed thereafter.[6] However, should both a state-created competing lien and a federal lien attach simultaneously, the federal tax lien receives priority.[7] Generally, the assignee of a lien that has been properly filed has priority over an asserted lien of the United States that has not been properly filed.[8]

Other federal statutes, such as the Bankruptcy Act[9] and federal tax lien statutes, also give priority to liens and claims of the United States.[10]

> ◆ **Illustrations:** A government lien was superior to that of the pledgee with respect to money advanced after the date the lien was filed.[11] Additionally, a federal tax lien duly filed prior to the accident in which the taxpayer is injured has priority over a hospital lien arising out of care and treatment of the taxpayer's injuries against the settlement proceeds of his claim for personal injuries sustained in the accident since the hospital's lien had not yet become choate.[12] Finally, liens in competition with liens of the United States and state or local tax liens subsequent in time are in effect taxes upon the liens of the United States.[13]

§ 44 Government liens; federal priority—State priority

Research References

West's Key Number Digest, Liens ⚷12

Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 A.L.R.5th 317

The State of New York has a common-law prerogative right to priority in payment out of the assets of an insolvent debtor and is entitled

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[5]In re Rosenberg's Will, 62 Misc. 2d 12, 308 N.Y.S.2d 51 (Sur. Ct. 1970).

[6]U.S. v. Toys of the World Club, Inc., 288 F.2d 89, 94 A.L.R.2d 739 (2d Cir. 1961) (applying New York law).

[7]In re Rosenberg's Will, 62 Misc. 2d 12, 308 N.Y.S.2d 51 (Sur. Ct. 1970).

[8]Harman v. Fairview Associates, 30 A.D.2d 492, 294 N.Y.S.2d 442 (4th Dep't 1968), order rev'd on other grounds, 25 N.Y.2d 101, 302 N.Y.S.2d 791, 250 N.E.2d 209 (1969).

As to assignability of liens, generally, see § 6.

[9]Am. Jur. 2d, Bankruptcy §§ 1235 to 1244.

[10]Am. Jur. 2d, Federal Tax Enforcement §§ 244 to 272.

[11]Bankers Trust Co. v. Equitable Life Assur. Soc. of U.S., 19 N.Y.2d 552, 281 N.Y.S.2d 57, 227 N.E.2d 863 (1967).

[12]In re Walton's Estate, 20 A.D.2d 386, 247 N.Y.S.2d 21 (1st Dep't 1964).

[13]Dime Sav. Bank of Brooklyn v. Beecher, 23 A.D.2d 297, 260 N.Y.S.2d 500 (2d Dep't 1965), order aff'd, 18 N.Y.2d 763, 274 N.Y.S.2d 901, 221 N.E.2d 561 (1966).

to a preference over private creditors whose claims stand on the same footing as those of the State. The State's priority over general unsecured creditors extends not only to taxes but also to any debt due the State. However, the State's claim is not preferred over specific prior liens in the absence of statute.[1] The legislature has power to give a statutory lien priority over existing liens where the lien is in the nature of a public charge, such as taxes and assessments.[2]

A state has a common-law right of priority with respect to the payment of taxes over all other creditors of the taxpayers,[3] except the United States, with respect to a lien that arises before the State attempts to enforce its right.[4] Similarly, the Department of Health (DOH), as a state entity, enjoys a priority over claims of private creditors unless such creditors can demonstrate a superior lien or statutory right to defeat the State's preference.[5] Since the State enjoys a common-law prerogative right to priority in payment of debts owed to it from assets of insolvent debtor, it has no obligation to share pro rata with other creditors.[6]

III. WAIVER, LOSS, ESTOPPEL, OR DISCHARGE OF LIEN

A. WAIVER, LOSS, AND ESTOPPEL

Research References

West's Key Number Digest
Liens ⚷16

A.L.R. Library
A.L.R. Index, Liens and Encumbrances
West's A.L.R. Digest, Liens ⚷16

[Section 44]

[1]N.Y. Jur. 2d, Creditors' Rights and Remedies § 208.

[2]Petrow v. Bonim Demolition & Const. Corp., 51 Misc. 2d 589, 273 N.Y.S.2d 743 (Sup 1966).

For discussion of the priority among state and other local government liens, see N.Y. Jur. 2d, Taxation and Assessment § 645.

[3]Security Trust Co. v. West, 120 A.D.2d 84, 507 N.Y.S.2d 546 (3d Dep't 1986).

[4]Lacaille v. Feldman, 44 Misc. 2d 370, 253 N.Y.S.2d 937 (Sup 1964).

[5]Benedictine Hosp. v. Glessing, 47 A.D.3d 1184, 850 N.Y.S.2d 291 (3d Dep't 2008).

[6]Security Trust Co. v. West, 120 A.D.2d 84, 507 N.Y.S.2d 546 (3d Dep't 1986) (holding that a state tax commission lien for unpaid sales and income taxes is entitled to priority over a general creditor's lien even where the liens attached simultaneously to the debtor's after-acquired property).

As to the preference and priority of claims of the state on the assets of a debtor, generally, see N.Y. Jur. 2d, Creditors' Rights and Remedies § 208.

Legal Encyclopedias
Am. Jur. 2d, Liens §§ 57 to 67
C.J.S., Liens §§ 29 to 42

Forms
Am. Jur. Legal Forms 2d §§ 165:45 to 165:48
Am. Jur. Pleading and Practice Forms, Liens § 49
New York Forms Legal and Business §§ 16A:30 to 16A:33

§ 45 Waiver, generally

Research References

West's Key Number Digest, Liens ⚷16
Am. Jur. Legal Forms 2d § 165:45 (Anticipatory waiver of lien); § 165:46 (Waiver of existing lien); § 165:47 (Contract provision—Lien created by contract not to be construed as waiver of statutory lien); § 165:48 (Agreement to subordinate lien—Between lienholder and lender extending credit to owner)
Am. Jur. Pleading and Practice Forms, Liens § 49 (Counterclaim—For recovery of property in lienor's possession—For damages—Demand by lienor in excess of amount due as constituting waiver of lien)
New York Forms Legal and Business § 16A:30 (Contract provision—Lien created by contract not to be construed as waiver of statutory lien)
New York Forms Legal and Business § 16A:32 (Waiver of existing lien)

◆ **National Background:** In some jurisdictions, the waiver of a lien may be express, or it may be implied from conduct that is inconsistent with the continued existence of the lien.[1] In New York, a waiver of lien generally will not be implied.

A lien may be lost by an intentional waiver, but a lien will not be held to be waived unless the intent to do so is express,[2] and it is shown that the lien was knowingly surrendered.[3] A possessory lien is lost where the bailee converts the property entrusted to him or her.[4] A

[Section 45]

[1]Am. Jur. 2d, Liens § 59.

[2]Beacon Const. Co., Inc. v. Matco Elec. Co., Inc., 521 F.2d 392 (2d Cir. 1975) (applying New York law).

Sometimes, there may be a waiver of lien by an express agreement allowing the owner open credit for work done instead of requiring payment upon delivery of the completed goods under penalty of lien. U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

As to the voluntary surrender of the liened property constituting a waiver of lien, see § 48.

[3]Church E. Gates & Co. v. Empire City Racing Ass'n, 225 N.Y. 142, 121 N.E. 741 (1919).

[4]Susi v. Belle Acton Stables, Inc., 360 F.2d 704 (2d Cir. 1966) (applying New York law).

As to bailees' liens, generally, see N.Y. Jur. 2d, Bailments and Chattel Leases §§ 103 to 106.

For discussion of conversion, gener-

lien may be waived by surrender of possession[5] or by inconsistent agreements as to credit or payment or otherwise.[6]

The question whether there has been a waiver depends upon the intent of the parties as drawn from the surrounding circumstances.[7] If an equitable lien has once arisen, the subsequent taking of a legal and perfected lien does not extinguish the equitable lien by waiver.[8]

§ 46 Statutory prohibition against waiver

Research References

West's Key Number Digest, Liens ⚷16

Statutes may prohibit the waiver of a statutory lien as against public policy.[1] The Lien Law expressly provides that various liens may not be waived or impaired as by the taking of any note or notes for the moneys due under a lien of a motion-picture film laboratory[2] or of a manufacturer or throwster of silk goods.[3] However, an express waiver of a lien in a contract in compliance with statute is binding and enforceable in that such waiver extinguishes the right to file a notice of lien and the relinquishment of such right cannot be recalled or expunged.[4]

A written instrument that purports to be a release in whole or in part of a lien upon personal property is not invalid because of the absence of consideration or of a seal.[5]

§ 47 Estoppel or preclusion

Research References

West's Key Number Digest, Liens ⚷16

A waiver embraces the idea that a lienholder by agreement, express or implied, has relinquished the lien, while estoppel results where the

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ally, see N.Y. Jur. 2d, Conversion, and Action for Recovery of Chattel §§ 1 to 88.

[5]§ 48.

[6]§ 49.

[7]Blumenberg Press v. Mutual Mercantile Agency, 177 N.Y. 362, 69 N.E. 641 (1904).

Church E. Gates & Co. v. Empire City Racing Ass'n, 225 N.Y. 142, 121 N.E. 741 (1919).

[8]Payne v. Wilson, 74 N.Y. 348, 1878 WL 12662 (1878).

[Section 46]

[1]Lien Law § 34, as discussed at N.Y. Jur. 2d, Mechanics' Liens § 119.

[2]Lien Law § 188, discussed further at §§ 31, 32.

[3]Lien Law § 185, discussed further at § 33.

[4]Beacon Const. Co., Inc. v. Matco Elec. Co., Inc., 521 F.2d 392 (2d Cir. 1975) (applying New York law).

[5]GOL § 15-303, discussed at N.Y. Jur. 2d, Compromise, Accord, and Release § 90.

lienor by his or her acts and conduct has precluded himself or herself from asserting the lien.[1] One having a lien upon a chattel in his or her possession who does not disclose the lien and claims to be the owner is estopped from setting up his or her lien in an action to recover possession.[2] Moreover, the failure to proceed against all the security is an abandonment of the lien on the portion omitted.[3]

§ 48 Surrender of possession

Research References

West's Key Number Digest, Liens ⚷16

The common-law right to retain possession of personal property belonging to another, until some debt due as to or secured by such property is paid or satisfied,[1] is lost by the voluntary[2] surrender of possession.[3] This rule as to the requirement of possession applies where a common-law lien is extended by statute.[4] However, in some cases, the statute will be construed to permit a lien upon goods in possession for services performed upon goods already surrendered.[5]

◆ **Illustrations:** The release by a motion-picture film laboratory of a negative and positive print of a film for distribution, for which service payment was never received, did not act as a waiver of the laboratory's right to a lien on 12 remaining films where the contract for work performed expressly reserved to the laboratory all statutory[6] rights.[7] However, it was held that although a garage person's lien has been extended by statute, it still depends on possession and

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[Section 47]

[1]Am. Jur. 2d, Liens § 59.

[2]Maynard v. Anderson, 54 N.Y. 641, 1873 WL 10507 (1873).

[3]Wydra v. Chai, 50 A.D.3d 779, 857 N.Y.S.2d 580 (2d Dep't 2008).

[Section 48]

[1]§ 11.

[2]Higgins v. Murray, 73 N.Y. 252, 1878 WL 12558 (1878).

[3]Rapp v. Mabbett Motor Car Co., 201 A.D. 283, 194 N.Y.S. 200 (4th Dep't 1922).

Dean v. Butler, 166 A.D. 367, 152 N.Y.S. 34 (3d Dep't 1915).

[4]Danzer v. Nathan, 145 A.D. 448, 129 N.Y.S. 966 (2d Dep't 1911) (artisan's lien).

Rochester Production Credit Ass'n v. Dickens Bros., Inc., 39 Misc. 2d 847, 242 N.Y.S.2d 309 (County Ct. 1963) (artisan's lien waived by surrender of possession).

[5]21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

The statute defining the garageperson's lien contains special provisions that modify this rule. For discussion of a garageperson's lien, generally, see N.Y. Jur. 2d, Garages, Filling, and Parking Stations §§ 79 to 96.

As to the effect, generally, of statute on the common-law lien, see § 12.

[6]Lien Law § 188.

[7]21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

that the lien was lost when the owner took the car without objection.[8]

Surrender of possession under an express agreement that the lien will continue may give rise to an equitable lien.[9] The mere temporary surrender of possession does not necessarily destroy an equitable lien.[10] For example, the owner cannot destroy the possession, or the lien, at least as between himself and the lienholder, by receiving the property under an agreement to use it in a certain way for a special purpose and thereupon return it provided that the agreement is reasonably consistent with the existence of the bailment, and there is not a voluntary relinquishment of the lien.[11]

If one obtained possession of property subject to a lien without the consent of the lienor, the lien is not thereby destroyed and continues after the lienor regains possession.[12]

A lienor does not lose the lien on a chattel for services rendered by surrendering possession on the strength of a check that is subsequently dishonored.[13]

§ 49 Agreement inconsistent with lien

Research References

West's Key Number Digest, Liens ⚷16

New York Forms Legal and Business § 16A:33 (Agreement to subordinate lien—Between lienholder and lender extending credit to owner)

Inasmuch as a lien that otherwise would be implied from an agreement or a relationship is negatived if inconsistent with the express terms or the clear intent of the contract between the parties,[1] possessory liens may be lost, or never attach in the first place, where special[2] or inconsistent payment terms are agreed upon.[3] Similarly, the right of detaining a thing until the money due upon it is paid may be

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[8] Grand Garage v. Pacific Bank, 170 N.Y.S. 2 (App. Term 1918).

[9] § 15.

[10] Fidelity & Casualty Co. of New York v. Peckett, 220 A.D. 118, 220 N.Y.S. 612 (1st Dep't 1927) (even in the absence of acquiescence on the part of the mortgagee in a lienor's release of the chattel, where there is a promise of the owner to return it, such relinquishment of possession does not destroy the lien, and the lienor still has constructive possession).

[11] Johanns v. Ficke, 224 N.Y. 513, 121 N.E. 358 (1918).

[12] Horowitz v. Hurlburt Motor Truck Co., 176 N.Y.S. 514 (App. Term 1919).

[13] Church E. Gates & Co. v. Empire City Racing Ass'n, 225 N.Y. 142, 121 N.E. 741 (1919).

Yellow Mfg. Credit Corp. v. Horowitz, 166 Misc. 251, 2 N.Y.S.2d 566 (App. Term 1938).

[Section 49]

[1] § 19.

[2] U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

[3] Morgan v. Congdon, 4 N.Y. 552, 1851 WL 5463 (1851).

Brackett v. Pierson, 114 A.D. 281,

deemed waived by a special agreement as to the time or mode of payment.[4]

◆ **Illustrations:** There may be a waiver of a lien by an express agreement allowing the owner open credit for work done instead of requiring payment upon delivery of the completed goods under penalty of lien.[5] Additionally, where a film owner establishes a question of fact whether the film lab agreed to defer payment for services performed until funds were payable to the owner from its distributor, the owner is entitled to injunctive relief preventing an ex parte extrajudicial sale until a litigation of the respective rights of the parties.[6] Similarly, a lender that provided a bridge loan to a borrower in connection with the refinancing of the borrower's townhouse was not entitled to an equitable lien after the mortgagee foreclosed on the property; although the lender alleged that it made the loan in exchange for a security interest in the property, a letter contemporaneous with the transaction stated that any mortgage on the property was to be in favor of another entity.[7]

B. DISCHARGE OR CANCELLATION OF LIEN

Research References

West's Key Number Digest

Liens ⚷16

A.L.R. Library

A.L.R. Index, Liens and Encumbrances
West's A.L.R. Digest, Liens ⚷16

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 57 to 67
C.J.S., Liens §§ 29 to 42

Forms

Am. Jur. Legal Forms 2d §§ 165:51 to 165:53
Am. Jur. Pleading and Practice Forms, Liens §§ 17, 18
West's McKinney's Forms, Selected Consolidated Laws, Lien Law §§ 184 Form 1 to 184 Form 9
West's McKinney's Forms, Selected Consolidated Laws, Lien Law §§ 201-a Form 1 to 201-a Form 6
New York Forms Legal and Business § 16A:34

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99 N.Y.S. 770 (3d Dep't 1906).

[4]Wiles Laundry Co. v. Hahlo, 105 N.Y. 234, 11 N.E. 500 (1887).

[5]U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

[6]Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc. 2d 853, 414 N.Y.S.2d 596 (Sup 1979).

[7]M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd., 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009).

§ 50 Discharge of lien; mistake

Research References

West's Key Number Digest, Liens ⚷16

Am. Jur. Legal Forms 2d § 165:51 (Release of lien); § 165:52 (Release of lien—By health care provider); § 165:53 (Release of judgment lien)

New York Forms Legal and Business § 16A:34 (Release of lien)

Payment of a debt extinguishes a lien that is based thereon,[1] and a lien will normally continue to be a charge upon property until the obligation for which it is security has been discharged[2] unless it is lost by waiver or estoppel.[3] Where there exists no defect upon the face of a notice of lien, any dispute regarding the validity of the lien must await a judicial determination, and the court cannot summarily discharge the lien.[4]

Under general principles of equity, a lien affecting real estate, discharged by mistake, may be restored to its original status and priority as a lien provided that no injury is inflicted thereby upon anyone who innocently relied upon the discharge and either purchased the property or made a loan thereon in reliance upon the validity of such satisfaction.[5]

◆ **Illustration:** Where the court granted the plaintiff an equitable lien on property conveyed as a result of the defendant's fraud, the plaintiff is entitled to recover the value of the property within 60 days after service of the order upon the defendant, or the lien would be discharged through execution and sale of the defendant's property.[6]

§ 51 Discharge of nonpossessory liens

Research References

West's Key Number Digest, Liens ⚷16

Am. Jur. Pleading and Practice Forms, Liens §§ 17 (Petition or application—For discharge of lien on substitution of bond), 18 (Order—Directing discharge of lien on substitution of bond therefor)

Statutes creating nonpossessory liens frequently provide for their

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[Section 50]

[1]Am. Jur. 2d, Liens § 66.

[2]Baranowski v. Wetzel, 174 A.D. 507, 161 N.Y.S. 153 (2d Dep't 1916).

[3]§§ 45 to 49.

[4]In re Lowe, 4 A.D.3d 476, 772 N.Y.S.2d 359 (2d Dep't 2004).

Melniker v. Grae, 82 A.D.2d 798, 439 N.Y.S.2d 409 (2d Dep't 1981).

As to proceedings to determine the validity of a lien or the amount claimed, see § 62.

[5]Application of Ditta, 221 N.Y.S.2d 34 (Sup 1961).

[6]Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

discharge. For example, the Lien Law provides that a lien for labor on stone may be discharged by a payment of the amount due thereon, by:

- a failure to bring an action to enforce the lien within three months after the filing of notice[1]
- the written consent of the lienor, duly acknowledged and filed with the proper officer[2]
- the owner of the stone labored upon, by filing an undertaking in an amount twice the sum specified in the notice of lien, conditioned for the payment of the lienor[3]

The failure to obtain an order continuing a lien within the prescribed period is a fatal omission and, inasmuch as such lapses are final, no lien is therefore in effect to support a foreclosure action.[4]

§ 52 Judgment of cancellation

Research References

West's Key Number Digest, Liens ⚷16

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 18 Form 2 (Counterclaims Based on Lien of Bailee in Action to Recover Possession of Aircraft)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 1 (Affirmative Defense of Lien of Bailee in Action to Recover Possession of Aircraft)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 3 (Affirmative Defense of Lien of Bailee in Action to Recover Damages for Conversion of Motor Vehicle)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 4 (Notice of Motion for Summary Judgment to Dismiss Complaint Against Sheriff Arising from Repossession of Stolen Vehicle Subject to Garageman's Lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 5 (Affirmation in Support of Motion for Summary Judgment to Dismiss Complaint Against Sheriff Arising from Repossession of Stolen Vehicle Subject to Garageman's Lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 6 (Order Dismissing Complaint Against Sheriff Arising from Repossession of Stolen Vehicle Subject to Garageman's Lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form

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[Section 51]

[1]Lien Law § 141.

As to statutory enforcement of liens, generally, see §§ 57, 58.

[2]Lien Law § 142.

[3]Lien Law § 142.

[4]Walker v. Buffalo Elec. Const., Inc., 83 A.D.2d 768, 443 N.Y.S.2d 619 (4th Dep't 1981), order aff'd, 55 N.Y.2d 843, 447 N.Y.S.2d 705, 432 N.E.2d 598 (1982) (mechanic's lien).

For discussion of discharge of mechanic's liens, see N.Y. Jur. 2d, Mechanics' Liens §§ 124 to 142.

7 (Complaint in Action Against Garage for Conversion of Automobile That Was Subject of Restoration Contract)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 8 (Notice of Motion for Partial Summary Judgment on Issue of Liability in Action Against Garage for Conversion of Automobile That Was Subject of Restoration Contract)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 184 Form 9 (Affidavit in Support of Motion for Partial Summary Judgment on Issue of Liability in Action Against Garage for Conversion of Automobile That Was Subject of Restoration Contract)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 1 (Notice of Petition to Determine Validity of Lien on Personal Property—Reduction of Amount of Lien)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 2 (Petition to Determine Validity of Lien on Personal Property—Reduction of Amount of Lien)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 3 (Judgment Determining Validity of Lien on Personal Property—Reduction of Amount of Lien)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 4 (Order to Show Cause in Special Proceeding to Determine Validity of Lien on Personal Property—Cancellation of Lien)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 5 (Petition in Special Proceeding to Determine Validity of Lien on Personal Property—Cancellation of Lien)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201-a Form 6 (Judgment in Special Proceeding Determining Validity of Lien on Personal Property—Cancellation of Lien)

If the owner of personal property, upon which a lien is sought to be enforced by extrajudicial sale, or any person entitled to notice of such sale, shows that the lienor is not entitled to claim a lien on the property, or that all or part of such amount exceeds the fair and reasonable value of the services performed by the lienor, the court must direct the entry of judgment cancelling the lien or reducing the amount claimed thereunder accordingly.[1]

◆ **Illustrations:** In a special proceeding to determine the validity of certain liens,[2] a lienor's motion to vacate a judgment invalidating liens was properly denied as academic since the petitioner was authorized to take possession of the property in question after notices of sale and notices of lien were discharged and in fact had removed it from the lienor's premises; under the statute governing

[Section 52]

[1]Lien Law § 201-a.

As to enforcement of liens by extrajudicial sale, generally, see §§ 59 to 76.

For discussion of special proceedings to determine the validity of a lien prior to enforcement thereof, see § 62.

[2]Pursuant to Lien Law § 201-a.

liens of a bailee of motor vehicles, motor boats, or aircraft,[3] the lien was vacated once the property was no longer in the lienor's possession.[4]

IV. ENFORCEMENT OF LIENS

A. IN GENERAL

Research References

West's Key Number Digest
Liens ⚷7, 8, 17 to 22

A.L.R. Library
A.L.R. Index, Liens and Encumbrances
West's A.L.R. Digest, Liens ⚷7, 8, 17 to 22

Legal Encyclopedias
Am. Jur. 2d, Liens §§ 79 to 82
C.J.S., Liens §§ 46 to 59

Forms
New York Forms Legal and Business § 16A:21

1. Judicial Enforcement

§ 53 Generally

Research References
West's Key Number Digest, Liens ⚷17 to 22

The Lien Law provides in detail as to the manner of enforcement of liens on real property[1] and on personal property.[2] While at common law, a possessory lien on personal property amounted only to a right of detention,[3] the statute now affords means of realizing payment upon possessory liens by extrajudicial public sale.[4] However, the lienholder has no authority to sell the property except as provided by statute.[5]

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[3]Lien Law § 184.

[4]Matter of Kahoud, 128 A.D.2d 531, 512 N.Y.S.2d 464 (2d Dep't 1987).

[Section 53]

[1]Lien Law §§ 40 to 65.

Additionally, Lien Law §§ 40 to 65 provide proceedings for the enforcement of mechanic's liens for labor performed and materials furnished in the improvement of real property.

For discussion of enforcement proceedings for mechanic's liens, see N.Y. Jur. 2d, Mechanics' Liens §§ 156 to 390.

[2]Lien Law §§ 200 to 211.

[3]§ 11.

[4]§§ 59 to 76.

[5]In re Kiamie's Estate, 191 Misc. 179, 76 N.Y.S.2d 684 (Sur. Ct. 1948), corrected, 116 N.Y.S.2d 179 (Sur. Ct. 1952) and decree aff'd by, 283 A.D. 941,

◆ **Illustration:** The right to possess property under an artisan's lien, impounded by the sheriff in a creditor's action against the debtor-owner, is an integral part of the lienor's interest, but only the claim and not the property itself may be sold by the sheriff, who then transfers possession of the property to the purchaser of the debt and the lien thereon; the purchaser-lienor must then execute the lien by sale of the chattel.[6]

The Lien Law governing the enforcement of liens on personal property[7] provides to lienors, that is, a person having a lien by virtue of its provisions,[8] the right of sale that always existed at common law in a pledge of personal property.[9]

§ 54 Enforcement of equitable liens

Research References

West's Key Number Digest, Liens ⚷7, 17, 18

New York Forms Legal and Business § 16A:21 (Notice of claim of lien and intention to sell)

An equitable lien is cognizable only in equity, and the only remedy for its establishment and enforcement is an action in equity.[1] Since an equitable lien does not divest the debtor of title or possession, a court action is necessary to reach the property or its proceeds.[2] Where property is held by one person subject to an equitable lien, the lienor can enforce it by a proceeding in equity in which the court may order the sale of the liened property.[3]

In an equitable action to establish and enforce a lien upon a fund, or upon the money into which the subject of the lien has been converted, a judgment of foreclosure and sale is unnecessary since a money judgment may be rendered therein.[4]

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131 N.Y.S.2d 302 (1st Dep't 1954), rev'd on other grounds, 309 N.Y. 325, 130 N.E.2d 745 (1955).

[6]U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972).

[7]Lien Law §§ 200 to 211.

[8]§ 58.

[9]In re Kiamie's Estate, 191 Misc. 179, 76 N.Y.S.2d 684 (Sur. Ct. 1948), corrected, 116 N.Y.S.2d 179 (Sur. Ct. 1952) and decree aff'd by, 283 A.D. 941, 131 N.Y.S.2d 302 (1st Dep't 1954), rev'd on other grounds, 309 N.Y. 325, 130 N.E.2d 745 (1955).

[Section 54]

[1]Hovey v. Elliott, 118 N.Y. 124, 23 N.E. 475 (1890).

As to the establishment of equitable liens, generally, see §§ 13 to 22.

For discussion of equity foreclosure, see § 79.

[2]In re Gruner, 295 N.Y. 510, 68 N.E.2d 514, 167 A.L.R. 628 (1946).

[3]Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

[4]Fischer-Hansen v. Brooklyn

§ 55 Enforcement of equitable liens—Jurisdiction of court

Research References

West's Key Number Digest, Liens ⚷17, 18

The county courts are courts of limited jurisdiction, with no inherent equitable power, that can exercise only such powers, not within the exclusive jurisdiction of the Supreme Court, as are conferred upon them by the constitution or by legislative act.[1]

A court with equity jurisdiction has the power and the right to deal with liens.[2] Where a lien has been created by statute, and no remedy is provided for its enforcement, resort to a court's equitable powers may generally be had.[3] For example, a suit lies in equity to enforce a lien where the lienor has no adequate remedy at law, as where the security is presently not in existence, or it or its proceeds are in the hands of a third person and can be reached only by the application of equitable maxims.[4]

Where a statute creates a specific lien and gives a specific remedy for the enforcement of such lien, without expressly saving other remedies, a court of equity has no jurisdiction to enforce it in the absence of some special ground of equitable interposition rendering the remedy at law unavailable or inadequate.[5] Generally, if a statutory lien fails at law, it must also fail of enforcement in equity. For example, a defective statutory mechanic's lien cannot be enforced as an equitable lien.[6]

Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903).

[Section 55]

[1]N.Y. Jur. 2d, Courts and Judges § 746.

[2]Queen v. Fryer, 232 A.D. 222, 249 N.Y.S. 651 (1st Dep't 1931).

For discussion of the equitable jurisdiction of the courts, generally, see N.Y. Jur. 2d, Courts and Judges §§ 738 to 945.

[3]Bogartz v. Astor, 7 Misc. 2d 158, 45 N.Y.S.2d 74 (Sup 1943).

[4]National Bank of Deposit of City of New York v. Rogers, 166 N.Y. 380, 59 N.E. 922 (1901).

Because a party holding an equitable lien arising from another's fraud does not have a mere charge on the property but an enforceable right to the debt secured by the lien, a divorced woman whose former husband had fraudulently induced her to convey her interest in property formerly held by the couple could proceed in equity to immediately enforce the obligation without waiting until her former husband sold the property. Disanza v. Gaglione, 126 Misc. 2d 232, 482 N.Y.S.2d 413 (Sup 1984).

[5]In re Rosenberg's Will, 269 N.Y. 247, 199 N.E. 206, 105 A.L.R. 1238 (1935).

[6]General Electric Co. v. Mori, 201 N.Y.S. 561 (Sup 1923).

§ 56 Election of remedies

Research References

West's Key Number Digest, Liens ⚷17, 18

The Lien Law does not preclude any other remedy by action or otherwise, now existing, for the enforcement of a lien against personal property, or bar the right to recover so much of the debt as will not be paid by the proceeds of the sale of the property.[1] The provisions of the Lien Law governing foreclosure actions[2] do not affect any existing right or remedy to foreclose or satisfy a lien upon, or a security interest in, a chattel without action.[3] The failure to use the statutory remedy to test the validity of a lien prior to extrajudicial sale does not estop one from contesting or obtaining relief from the results of a lien sale, or foreclose other available remedies, such as an action for conversion or replevin.[4]

> ◆ **Illustrations:** An unpaid manufacturer of copyrighted articles, where delivery is refused on the ground that the articles were defective, is not precluded by the federal copyright law from obtaining an artisan's lien on the goods, and, notwithstanding the copyright, he may avail himself of the statutory remedies under New York law for sale on notice or for enforcement by action.[5] Also, there is no inconsistency between an attempt to collect the indebtedness by ordinary suit and the enforcement of a reservation of title if the attempt is not successful.[6]

Circumstances may limit the lienor's choice of remedies. For example, if for any reason there is no personal obligation on the part of the debtor to pay the debt secured by the lien, there is no remedy either at law for a personal judgment for the debt or deficiency, or in the foreclosure action for a deficiency judgment.[7] If the statute of limitations has run against an action on the debt, a remedy in rem alone may exist.[8] As regards the proceeding in rem, the lienor may, depending upon the nature of the lien involved, be limited either to an action or to an extrajudicial sale, or, as in the case of an attorney's

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[Section 56]

[1] Lien Law § 205.

[2] Lien Law §§ 200 to 209.

[3] Lien Law § 210.

[4] § 62.

[5] Platt & Munk Co. v. Republic Graphics, Inc., 315 F.2d 847 (2d Cir. 1963).

[6] Ratchford v. Cayuga County Cold Storage & Warehouse Co., 217 N.Y. 565, 112 N.E. 447 (1916).

[7] § 103.

[8] Hutson v. Title Guarantee & Trust Co., 118 Misc. 795, 195 N.Y.S. 316 (Sup 1922).

As to limitations and laches, generally, see § 80.

retaining lien, he or she may have no right whatsoever to foreclose.[9] However, respecting liens on real property, if a lienor fails, for any reason, to establish a valid lien in any action, he or she may recover judgment therein for such sums as are due him or her, or that he or she might recover in an action on a contract against any party to the action.[10]

2. Statutory Remedies

§ 57 Enforcement of statutory liens

Research References

West's Key Number Digest, Liens ⚷8, 17, 18

Generally, a statutory lien may be enforced only in the manner provided by the statute creating the right thereto unless the lienor is in lawful possession of the property.[1] The Lien Law provides that the sections governing the enforcement of liens by action of foreclosure[2] do not apply to a case where another mode of enforcing a lien upon a chattel is specifically prescribed by law.[3]

§ 58 Applicability of general enforcement provisions

Research References

West's Key Number Digest, Liens ⚷8, 17, 18

The Lien Law definition of a lienor as any person having a lien upon property by virtue of the provisions of the Lien Law, including a successor in interest,[1] excludes from the operation of the general sale and enforcement provisions any lien that is not declared or created by the Lien Law itself.[2] Certain statutory liens are expressly excluded

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[9]In re Wilson, 12 F. 235 (S.D. N.Y. 1882).

As to the merely passive right of an attorney to hold the subject of the lien until his or her fees are paid or adequate security given, see N.Y. Jur. 2d, Attorneys at Law § 285.

[10]Lien Law § 54.

As to enforcement of mechanic's liens on real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 156 to 390.

[Section 57]

[1]Scott v. Delahunt, 65 N.Y. 128, 1875 WL 10944 (1875), declaring that the statutory remedy is cumulative to the remedy afforded to him as a common-law lienor.

[2]N.Y. Lien Law §§ 209 to 211.

[3]Lien Law § 210.

For discussion of action for foreclosure, see §§ 77 to 103.

[Section 58]

[1]Lien Law § 2(1).

[2]In re Kiamie's Estate, 191 Misc. 179, 76 N.Y.S.2d 684 (Sur. Ct. 1948), corrected, 116 N.Y.S.2d 179 (Sur. Ct. 1952) and decree aff'd by, 283 A.D. 941, 131 N.Y.S.2d 302 (1st Dep't 1954), rev'd on other grounds, 309 N.Y. 325, 130 N.E.2d 745 (1955).

from the general provisions for extrajudicial sale,[3] while chattel mortgages, conditional sales, and similar security interests created by a security agreement in personal property are expressly included in the general provisions for enforcement by action.[4] Moreover, by implication at least, the Lien Law provision expressly denominating chattel mortgages, conditional sales contracts, and other security interests as liens for the purpose of making available foreclosure by action negates a narrow construction including only lienors whose liens are created or defined by the Lien Law itself.[5]

B. EXTRAJUDICIAL SALE OF PERSONAL PROPERTY

Research References

West's Key Number Digest

Liens ⚷8, 17 to 23

A.L.R. Library

A.L.R. Index, Liens and Encumbrances
West's A.L.R. Digest, Liens ⚷8, 17 to 23

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 83 to 94
C.J.S., Liens §§ 46 to 59

Forms

Am. Jur. Legal Forms 2d §§ 165:34 to 165:39, 165:49, 165:50
Am. Jur. Pleading and Practice Forms, Liens §§ 47, 78, 79, 86, 89, 91, 92
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201 Form 1
West's McKinney's Forms, Selected Consolidated Laws, Lien Law §§ 202 Form 1 to 202 Form 6
New York Forms Legal and Business § 16A:24

1. In General

§ 59 General provision for extrajudicial sale

Research References

West's Key Number Digest, Liens ⚷19
Am. Jur. Legal Forms 2d § 165:39 (Notice of sale to satisfy lien—Hotelkeeper's lien)

A lien against personal property in the possession of the lienor may

As to the enforcement of mechanic's liens on real property, see N.Y. Jur. 2d, Mechanics' Liens §§ 156 to 390.

[3]Lien Law § 200.

[4]Lien Law § 206.

[5]§ 83.

be satisfied by the sale of such property in accordance with law.[1] Expressly excepted are the warehousepersons' or carriers' lien, an innkeepers' lien, and a security interest in goods.[2] Expressly excluded is the lien of a keeper of a hotel, apartment house, inn, boarding or lodging house except an immigrant lodging house.[3] Expressly included in the general provisions for sale of personal property in satisfaction of such lien are common and preferred stocks and bonds, debentures, notes, and other obligations, corporate or otherwise, for the payment of money.[4]

§ 60 Special sales provisions—Self-storage facility lien

Research References

West's Key Number Digest, Liens ⚷8, 19

In addition to the general sale provision for the enforcement of liens,[1] the lien of the owner of a self-storage facility[2] may be enforced by a public or private sale of the goods that have been removed from the storage space, in block or parcel, at any time or place and on any terms that are commercially reasonable after notice to all persons known to claim an interest in the goods.[3]

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the lienor is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the lienor either sells the goods in the usual manner in any recognized market therefor or if he or she sells at the current market price, or otherwise in conformity with commercially reasonable practices among dealers in the type of goods sold, he or she has sold in a commercially reasonable manner.

[Section 59]

[1]Lien Law § 200.

Where the lien is sought to be enforced against one in military service, the provisions of the New York State Soldiers' and Sailors' Civil Relief Act may apply to prohibit extrajudicial enforcement of mortgages on the personal property of one in military service, within the definition of the statute. For a discussion of this Act, see N.Y. Jur. 2d, Military and Civil Defense §§ 92 to 104.

As to manner, place, and notice of sale, see § 66.

[2]Lien Law § 200.

For discussion of a security interest as subject of an action for foreclosure, see § 83.

[3]Lien Law § 200.

As to enforcement of the innkeepers' lien, generally, see N.Y. Jur. 2d, Hotels, Motels, and Restaurants §§ 130 to 132.

[4]Lien Law § 202(1).

As to notice of sale of a security, see § 72.

[Section 60]

[1]§ 59.

[2]§ 35.

[3]Lien Law § 182(7).

As to what constitutes notice, see § 70.

However, a sale of more goods than was apparently necessary to insure satisfaction of the obligation is not commercially reasonable except in the aforementioned circumstances.[4]

§ 61 Special sales provisions—Lien on dies, molds, forms, or patterns

Research References

West's Key Number Digest, Liens ⚷8, 19

The Lien Law specifically provides that before enforcing a lien on a die, mold, form, or pattern, notice in writing must be given to the customer and to the holder of a perfected security interest, either delivered personally or sent by registered mail to the last-known address of the customer or holder of a perfected security interest. This notice must state that a lien is claimed for the damages set forth in or attached to such writing for manufacturing or fabrication work contracted and performed for the customer. Notice to the customer must also include a demand for payment.[1]

If the molder has not been paid the amount due within 60 days after the notice as provided by statute,[2] the molder may sell the die, mold, form, or pattern at a public auction.[3]

However, before a molder may sell the die, mold, form, or pattern, the molder must notify the customer and the holder of a perfected security interest as specified by statute.[4]

§ 62 Proceeding to determine validity of lien

Research References

West's Key Number Digest, Liens ⚷19, 22

Am. Jur. Pleading and Practice Forms, Liens §§ 78 (Judgment or decree—Provision—Establishing existence and priority of lien), 79 (Judgment or decree—Provision—Declaring lien void)

Within 10 days after service of notice of sale, the owner or any person entitled to notice may commence a special proceeding to determine the validity of the lien in any court that would have jurisdiction to render a judgment for a sum equal to the amount of the

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[4]Lien Law § 182(8).

For discussion of the manner and place of sale under the general sales provisions of the Lien Law, see §§ 75, 76.

[Section 61]

[1]Lien Law § 152, discussed further at § 38.

[2]Lien Law § 152.

[3]Lien Law § 153.

[4]Lien Law § 154(1), discussed at § 71.

lien.[1] This provision is permissive and not mandatory; the failure to use the remedy set forth does not estop one from contesting or obtaining relief from the results of a lien sale, or foreclose other available remedies, such as an action for conversion or replevin.[2] Further, a proceeding to determine the validity of the lien is not moot if the property has already been sold since the propriety of the sale depends upon the validity of the lien.[3]

If the lienor establishes the validity of the lien, in whole or part, the judgment must fix the amount thereof and provide that the sale may proceed upon the expiration of five days after service of a copy of the judgment, and notice of its entry, upon the owner of the property or any other person entitled to notice of the sale.[4]

◆ **Illustrations:** It was not error for the court to summarily deny a petition to invalidate a lien that was asserted by the respondent as a result of a dispute arising from an oral agreement whereby the respondent had agreed to paint the petitioner's car in exchange for permission to moor his boat in the water adjacent to the petitioner's property for a stated period since it was uncontested that the respondent painted car, as agreed, and that the petitioner sold part of his property, including his dock, before the respondent was able to make full use of it.[5] However, the court erred in dismissing an action to cancel a lien merely because the matter was improperly commenced as an action rather than a proceeding, and the court should have ordered that the plenary action be converted into a special proceeding[6] to determine the validity of the lien.[7] Finally, the New York City Civil Court lacked subject-matter jurisdiction to order injunctive relief staying a lien sale within a special proceeding challenging the validity of lien even though the court had subject-matter jurisdiction over the proceeding itself, and despite the court's inherent power to stay its own proceedings in a pending case, since the lien sale is not a function of the court's own process so that at the time injunctive relief was requested, there was no action pending in

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[Section 62]

[1]Lien Law § 201-a.

Lien Law § 182(7), governing enforcement of liens of owners of self-service storage facilities, similarly provide such protection and is discussed at § 70.

As to constitutional limitations on statutory liens that provide for summary enforcement, see §§ 24, 25.

For discussion of the statutory requirements of notice, see §§ 66 to 73.

[2]Champion v. Wilsey, 114 A.D.2d 630, 494 N.Y.S.2d 222 (3d Dep't 1985).

As to conversion and replevin of a chattel, generally, see N.Y. Jur. 2d, Conversion and Action for Recovery of Chattel §§ 1 et seq.

[3]Nachman v. Crawford, 114 A.D.2d 672, 494 N.Y.S.2d 493 (3d Dep't 1985).

[4]Lien Law § 201-a.

[5]Jones v. Marcy, 135 A.D.2d 887, 522 N.Y.S.2d 285 (3d Dep't 1987).

[6]Under Lien Law § 201-a.

[7]El Adawy v. New York Automotive Center, 131 A.D.2d 722, 516 N.Y.S.2d 911 (2d Dep't 1987).

which the court's proceedings could have been stayed; the statute governing stays of proceedings[8] is not a substitute for, nor an alternative to, a proper application for injunctive relief, and the statute governing proceeding to determine validity of liens[9] grants no injunctive jurisdiction to court not already vested with it.[10]

§ 63 Redemption before sale; purchase by pledgee

Research References

West's Key Number Digest, Liens ⚷23

At any time before such property is so sold, the owner thereof or any person entitled to notice of sale[1] may redeem the property by paying to the lienor the amount due on account of the lien and whatever legitimate expenses have been incurred at the time of such payment in serving the notice and advertising the sale as required. Upon making such payment, any of such persons are entitled to the possession thereof.[2]

◆ **Illustration:** Where a sheriff, in a creditor's action, levies upon the debtor's property in the possession of a lienor, the debtor-owner may redeem the property by paying to the sheriff the amount of the lien.[3]

Unless the pledge agreement otherwise provides, in all cases where a pledgee may lawfully sell pledged property and the property is sold at public sale, the pledgee, or his or her assignee or the legal representative of either, may fairly and in good faith purchase the pledged property or any part thereof at the sale. However, this provision does not apply to a sale of property pawned or pledged with a collateral-loan broker.[4] Nothing in the statute governing pledgees buying at a public sale[5] may be construed to invalidate any sale of a security made in accordance with an applicable agreement.[6]

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[8]CPLR 2201.

[9]Lien Law § 201-a.

[10]Maloney v. Rincon, 153 Misc. 2d 162, 581 N.Y.S.2d 120 (N.Y. City Civ. Ct. 1992).

[Section 63]

[1]Pursuant to Lien Law § 201, discussed further at §§ 66, 68.

[2]Lien Law § 203.

[3]U. S. Extrusions Corp. v. Strahs Aluminum Corp., 71 Misc. 2d 1016, 337 N.Y.S.2d 780 (Sup 1972) (artisan's lien).

[4]Lien Law § 202-b.

As to the distinction between a lien and a pledge, generally, see § 12.

For discussion of the sale of property by a collateral-loan broker, see N.Y. Jur. 2d, Banks and Financial Institutions § 978.

[5]Lien Law § 202-b.

[6]Lien Law § 202-a.

§ 64 Disposition of proceeds

Research References

West's Key Number Digest, Liens ⚷17
Am. Jur. Legal Forms 2d §§ 165:49, 165:50 (Certificate of satisfaction of lien)
Am. Jur. Pleading and Practice Forms, Liens § 89 (Notice—To lienee—Disposition of proceeds of sale of property subject to lien—By clerk of court)

Of the proceeds of such sale, the lienor will retain an amount sufficient to satisfy his or her lien, and the expenses of advertisement and sale. The balance of such proceeds, if any, must be held by the lienor subject to the demand of the owner, or his or her assignee or legal representative, or any person entitled to notice of sale,[1] and a notice that such balance is so held must be served personally or by mail upon all such persons.[2] Parties enjoying a lien upon real property are entitled to share in surplus proceeds regardless of whether their lien is legal or equitable.[3]

◆ **Illustrations:** If a lienor and the plaintiff were in dispute as to the former's charges for storage and repair, and if without taking the initiative to afford the plaintiff an opportunity for judicial ascertainment of the asserted debt the lienor authorized a sale by auction of the plaintiff's property, and the auctioneer turned over the proceeds from the sale to the lienor in partial satisfaction of the amount claimed, the plaintiff had a tenable contention that the statute governing the disposition of proceeds[4] as applied to him was repugnant to the Due Process Clause of the 14th Amendment and that he was entitled to declaratory judgment and perhaps compensatory and punitive damages.[5]

If such balance is not claimed by any of such persons within 30 days from the day of sale, such balance must be deposited with the treasurer or chamberlain of the city or village, or the commissioner of finance in the City of New York, or the supervisor of the town, where such sale was held. There must also be filed a copy of the notice or judgment served upon such persons and the notice of sale published or posted as required.[6] There must be filed with such deposit the affidavit of the lienor, stating:

[Section 64]

[1]Pursuant to Lien Law § 201.

[2]Lien Law § 204.

As to the general requirements of notice of sale, see § 66.

[3]Marine Midland Bank, N.A. v. A & M Warehouse, Inc., 118 Misc. 2d 555, 461 N.Y.S.2d 200 (Sup 1983).

[4]Lien Law § 204.

[5]Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973) (applying New York law).

[6]Lien Law § 204.

For discussion of publication of

- the name and place of business or residence of such persons, if known
- the articles sold
- the prices obtained therefor
- that the notice required was duly served and how served upon such persons
- that such sale was legally and how advertised[7]

The officer with whom such balance is deposited must credit the same to such persons and pay the same to such persons on demand and satisfactory evidence of identity. If such balance remains in the possession of such officer for a period of five years, unclaimed by a person legally entitled thereto, it must be transferred to the general funds of the town, village, or city, and be applied and used as other moneys belonging to such town, village, or city.[8] It is basic law that surplus money realized upon a sale in foreclosure is not a general asset of the owner of the equity of redemption but stands in the place of the land for all purposes of distribution among persons having liens upon the land.[9]

§ 65 Action for deficiency on extrajudicial sale

Research References

West's Key Number Digest, Liens ⚬═8, 19

Am. Jur. Pleading and Practice Forms, Liens §§ 47 (Complaint, petition, or declaration—Allegation—Sale of property to purchaser with notice of lien), 91 (Notice of motion—For deficiency judgment), 92 (Motion—For deficiency judgment)

Where a lien upon personal property or a chattel lien has been duly enforced by an extrajudicial sale, ordinarily, an action at law may be had to recover the amount of any deficiency.[1] A statutory sale to satisfy a possessory lien does not bar the right to recover so much of the debt as is not paid by the proceeds of the sale of the property.[2]

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notice of sale, see § 76.

[7]Lien Law § 204.

[8]Lien Law § 204.

[9]Mall v. Johnson, 97 Misc. 2d 889, 412 N.Y.S.2d 773 (County Ct. 1979).

[Section 65]

[1]Culver v. Sisson, 3 N.Y. 264, 1850 WL 5318 (1850) (personal liability on the part of a defendant must be shown).

For discussion of judgment of deficiency for sale of chattel upon action of foreclosure, see § 103.

[2]Lien Law § 205.

The right to recover a deficiency is not limited to technical liens, extending as well to security interests under the Uniform Commercial Code, including chattel mortgages, conditional sales contracts, and pledges, which provides that

2. Notice, Manner, and Place of Sale

a. General Notice of Sale

§ 66 Requirements of notice

Research References

West's Key Number Digest, Liens ⚷17 to 22
Am. Jur. Legal Forms 2d § 165:38 (Notice of sale to satisfy lien—Personal property—By lienholder)
Am. Jur. Pleading and Practice Forms, Liens § 86 (Notice—Sale of property subject to lien—To owner or other person having interest in chattel—Common-law lien)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 201 Form 1 (Notice to Owner of Sale of Personal Property to Satisfy Lien)
New York Forms Legal and Business § 16A:24 (Notice of sale of personal property)

Before a sale of personal property in satisfaction of a lien is held, the lienor must, with due diligence, serve a notice upon the owner of the property within the county if the owner can be found where the lien arose. If notice cannot be served upon the owner, then it may be served upon the person for whose account the same is then held personally provided that such service can be made with due diligence within the county where such lien arose.[1]

> ◆ **Illustration:** The owners of a garage failed, as matter of law, to exercise due diligence in serving notice of sale to the owners of a stored automobile where only the most perfunctory effort was made to furnish notice, the inadequacy of which totally failed to apprise either automobile owner of the impending auction. The departures of the garage owners from the strict requirements of the Lien Law—including the failure to exercise "due diligence" in serving the notice of sale—constituted conversion as matter of law.[2]

§ 67 Service by mail

Research References

West's Key Number Digest, Liens ⚷17 to 22
Am. Jur. Legal Forms 2d §§ 165:34, 165:35 (Notice of sale to satisfy lien—To owner and others who claim interest in property)

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if the security interest secures an indebtedness, the debtor is liable for any deficiency unless otherwise agreed. See N.Y. Jur. 2d, Secured Transactions § 354.

[Section 66]

[1]Lien Law § 201.

As to notice of sale to other persons with an interest in the property, see § 68.

For discussion of notice of judgment validating lien or amount claimed, see § 62.

[2]Ingram v. Machel and Jr. Auto Repair, Inc., 148 A.D.2d 324, 538 N.Y.S.2d 539 (1st Dep't 1989).

In three situations, notice of extrajudicial sale may be served by mail. In the event that the owner or person cannot with due diligence be found within the county where the lien arose, then such notice may be served by mailing it to the owner at his or her last known place of residence, or to his or her last known post-office address, or if the owner's place of residence or post-office address is not known, then to the last known place of residence or last known post-office address of the person for whose account the same is then held personally.[1] Any notice permitted herein to be served by mail must be sent by certified mail, return receipt requested, and by first-class mail.[2] Proper service by mail of notice of sale of property under lien is not demonstrated by the production of an unsigned receipt from the post office. Additionally, the due diligence required in attempting personal service on the owner before service by mail is authorized is not shown by testimony as to a mere call at the owner's residence and that there was nobody home as far as the witness could remember.[3] Notice by mail is also allowed where the property affected, other than a security, is of less than $100 in value.[4] Finally, it is allowed where the property affected is a motor vehicle that is to be sold to satisfy a lien for towing and storage under the Lien Law,[5] and the vehicle has a value of less than $500.[6]

◆ **Illustration:** A landlord failed to comply with the requirements of the nonjudicial foreclosure statute for service of notice of the sale of shares allocable to a shareholder-tenant's cooperative apartment where the landlord included an affidavit from the process server attesting that he was unable to serve the shareholder-tenant personally at her residence after due diligence and the affidavit of mailing to a cotenant at his address and failed to submit an affidavit to attest to the statutorily required mailing of notice to the shareholder-tenant at her residence by certified mail or with a certificate of mailing.[7]

The sale must be public, to the highest bidder, and held in the city or town where the lien was acquired.[8]

[Section 67]

[1]Lien Law § 201.

[2]Lien Law § 201.

As to the mailing requirements to serve notice of sale to enforce the lien of the owner of self-service storage facility, see § 70.

[3]Finkelstein v. Hel-Man Garage, 61 N.Y.S.2d 625 (App. Term 1946).

[4]Lien Law § 201.

[5]Lien Law § 202(3), discussed at § 74.

[6]Lien Law § 201.

[7]Travis v. 29-33 Convent Ave. HDFC, 19 Misc. 3d 749, 859 N.Y.S.2d 336 (Sup 2008).

[8]Lien Law § 202(1).

§ 68 Notice to interested persons

Research References

West's Key Number Digest, Liens ⚷17 to 22

Am. Jur. Pleading and Practice Forms, Liens § 86 (Notice—Sale of property subject to lien—To owner or other person having interest in chattel—Common-law lien)

The Lien Law requires, in addition to service of notice of sale upon the owner of the liened property or a person for whose account the lien is held,[1] that a like notice be served in the same way upon any person who has given the lienor notice of an interest in the property and upon any person who has perfected a security interest in the property by filing a financing statement pursuant to the provisions of the Uniform Commercial Code or who is listed as a lienholder upon the certificate of title of the property pursuant to the provisions of the Vehicle and Traffic Law.[2]

The requirement of notice, of the sale of property to satisfy a lien, to any persons who have given the lienor notice of an interest in the property subject to the lien apparently refers only to persons who have given actual notice to the lienor.[3] The mere filing of a chattel mortgage has been deemed sufficient notice of the mortgagee's interest in an automobile to require notice to be served.[4] Additionally, a receipt for a car from the owner is sufficient evidence of notice to the garagekeeper of the owner's interest to require a notice of sale to be given such owner.[5]

§ 69 Content of notice

Research References

West's Key Number Digest, Liens ⚷17 to 22

Notice of sale of personal property by the lienor must contain a statement of the following facts:

[Section 68]

[1] § 66.

[2] Lien Law § 201.

As to the notice required to all persons with a known interest in the goods, for a sale to enforce the lien of the owner of a self-service storage facility, see § 70.

As to perfection of security interests, generally, see N.Y. Jur. 2d, Secured Transactions §§ 164 to 180.

For discussion of certificates of title under the N.Y. Vehicle and Traffic Law, see N.Y. Jur. 2d, Automobiles and Other Vehicles §§ 362 to 382.

[3] Motor Discount Corp. v. Scappy & Peck Auto Body, Inc., 12 N.Y.2d 227, 238 N.Y.S.2d 670, 188 N.E.2d 907 (1963).

[4] National Surety Co. v. Gotham Garage Co., 127 Misc. 422, 216 N.Y.S. 290 (App. Term 1926).

[5] Herschenhart v. Mehlman, 125 Misc. 887, 213 N.Y.S. 48 (App. Term 1925).

- the nature of the debt or the agreement under which the lien arose, with an itemized statement of the claim and the time when due
- a brief description of the personal property against which the lien exists
- the estimated value of such property
- the amount of such lien, at the date of the notice[1]

◆ **Illustrations:** Notice of sale by a motion-picture film laboratory of 12 films in its possession sufficed as an itemized statement of its claim to give notice to the owner of the films of the impending sale.[2] However, where the notice of sale did not contain a statement of the estimated value of the property, the notice was defective even though the defect was raised or asserted by a person who was the original seller of the property and was alleged to know its value.[3]

The notice of sale also must require the owner, or any other person, to pay the amount of such lien on or before a day mentioned therein, not less than 10 days from the service of the notice, and the notice must state the time when and the place where such property will be sold if the amount specified is not paid.[4]

◆ **Illustrations:** A nine-day interval, fixed by date in a notice of lien mailed to the owner of an automobile that had accumulated an unpaid storage bill and by the date set for the final opportunity to satisfy the lien, was in violation of the statute[5] requiring 10 days' notice.[6]

Additionally, the notice must state that the owner or any such person is entitled to bring a proceeding to dispute, within 10 days of the service of notice,[7] the validity of the lien or the amount claimed.[8] If the agreement on which the lien is based provides for the continuous care of the property, the lienor is also entitled to receive all sums

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[Section 69]

[1]Lien Law § 201.

[2]21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 128 Misc. 2d 929, 491 N.Y.S.2d 551 (Sup 1985).

[3]Lewis v. Jim's Boat Yard, Inc., 73 Misc. 2d 24, 341 N.Y.S.2d 28 (Dist. Ct. 1973).

[4]Lien Law § 201.

As to service of notice of sale of liened personal property, see §§ 66, 67.

[5]Lien Law § 201.

[6]Ingram v. Machel and Jr. Auto Repair, Inc., 148 A.D.2d 324, 538 N.Y.S.2d 539 (1st Dep't 1989).

[7]Under Lien Law § 201-a.

[8]Lien Law § 201.

A similar notice provision applies under the specific enforcement statute governing liens of owners of self-service storage facilities, see § 70.

As to proceedings to determine the validity of a lien prior to extrajudicial sale and the time in which to take them, generally, see § 62.

that may accrue under the agreement, subsequent to the notice and prior to payment or a sale of the property, and the notice must contain a statement that such additional sum is demanded.[9]

◆ **Practice Tip:** While the statute[10] does not state that the specific dollar amount of the additional sums for continuous care of the property must be specified in the notice, and a general statement that the publisher of the notice claims an additional lien for whatever sum may be due for storage charges from blank date to blank date is sufficient to comply with the statute, the better practice would be to mention the amount.[11]

Furthermore, the notice must be verified by the lienor to the effect that the lien upon such property is valid, that the debt upon which such lien is founded is due and has not been paid, and that the facts stated in such notice are true to the best of his or her knowledge and belief.[12]

b. Specific Notice Requirements

§ 70 Notice of sale of self-storage facility goods

Research References

West's Key Number Digest, Liens ⚷8, 17 to 22

The Lien Law expressly provides for the enforcement of the lien of an owner of a self-service storage facility[1] and requires that notice be given to all persons known to claim an interest in the goods. Such notice must be personally delivered to the occupant, or sent by registered or certified mail, return receipt requested, to the occupant to the last address provided by the occupant, pursuant to the occupancy agreement.[2] The notice specifically must include:

- an itemized statement of the amount due
- the description of the property subject to the lien
- the nature of the proposed sale
- a demand for payment within a specified time, not less than 10 days from the receipt of notice
- a conspicuous statement that unless the claimant pays within that time, the goods will be advertised for sale and sold, at a

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[9]Lien Law § 201.

[10]Lien Law § 201.

[11]Lewis v. Jim's Boat Yard, Inc., 73 Misc. 2d 24, 341 N.Y.S.2d 28 (Dist. Ct. 1973).

[12]Lien Law § 201.

[Section 70]

[1]§ 60.

[2]Lien Law § 182(7).

For discussion of the mailing requirements to effect notice under the general sales provision of the McKinney's Lien Law, see § 67.

public or private sale, in a commercially reasonable manner
- the time and place of any public or private sale
- a statement that any person claiming an interest in the goods is entitled to bring a proceeding hereunder within 10 days of the service of the notice if he or she disputes the validity of the lien or the amount claimed[3]

§ 71 Notice of sale of dies, molds, forms, or patterns

Research References

West's Key Number Digest, Liens ⇨8, 17 to 22

The Lien Law specifically provides that before a molder who has a lien on a die, mold, form, or pattern may sell the die, mold, form, or pattern,[1] the molder must notify the customer and the holder of a perfected security interest by registered mail, return receipt requested.[2] This notice must include the following information:

(1) the molder's intention to sell the die, mold, form, or pattern 30 days after the customer's receipt of the notice;
(2) a description of the die, mold, form, or pattern to be sold;
(3) the time and place of the sale;
(4) an itemized statement for the amount due; and
(5) a statement that if a customer disputes the amount claimed under the lien, the customer is entitled to bring a proceeding within 10 days of the service of the notice of sale to establish the amount of the lien and that the proceeding may be brought in any court that would have jurisdiction to render a judgment for a sum equal to the amount of the lien.[3]

If there is no return of the receipt of the mailing or if the postal service returns the notice as being nondeliverable, the molder must publish notice of the molder's intention to sell the die, mold, form, or pattern in a newspaper of general circulation in the customer's last known place of business. The notice must include a description of the

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[3]Lien Law § 182(7).

As to advertisement of extrajudicial sale of personal property in satisfaction of lien, generally, see § 76.

For discussion of the content of notice of sale applicable under the general sale provisions, see § 69.

[Section 71]

[1]If the molder has not been paid the amount due within 60 days after the notice of the lien as provided by statute (Lien Law § 152), the molder may sell the die, mold, form, or pattern at a public auction. Lien Law § 153.

[2]Lien Law § 154(1).

For the definition of a "molder," see § 38.

[3]Lien Law § 154(1).

die, mold, form, or pattern.[4]

If the sale is for a sum greater than the amount of the lien, the excess will be paid to any other lienholder known to the molder at the time of the sale and any remainder to the customer, if the customer's address is known, or the state treasurer for deposit in the general fund if the customer's address is unknown to the molder at the time of the sale.[5] A sale may not be made under this statutory provision if it would be a violation of any right of the customer under federal patent or copyright law.[6]

§ 72 Notice of sale of security; description

Research References

West's Key Number Digest, Liens ⚷17 to 22

A description of a security, such as common or preferred stocks or bonds, debentures, notes, and other obligations, corporate or otherwise, for the payment of money, or a description substantially similar to any of the aforementioned securities, in the absence of any agreement to the contrary and unless otherwise provided by statute, is deemed sufficient for the purposes of a notice of sale of such security at public auction to satisfy a lien thereon even though the sale is not made pursuant to the enforcement provisions of the Lien Law.[1] Nothing in this provision is to be construed to invalidate any sale of such securities made in accordance with an applicable agreement.[2]

In addition to the general requirements for publication of notice of a sale under the enforcement provisions of the Lien Law,[3] the description of the security in the published notice must consist of a statement of the name of the issuer or obligor, the state of incorporation or organization of the issuer or obligor, the amount and class of the security, and the address of the issuer or obligor last known to the lienor.[4]

§ 73 Notice of private sale; surplus proceeds

Research References

West's Key Number Digest, Liens ⚷17 to 22
Am. Jur. Legal Forms 2d §§ 165:36, 165:37 (Notice of sale to satisfy lien—To

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[4]Lien Law § 154(2).

[5]Lien Law § 154(3).

[6]Lien Law § 154(4).

[Section 72]

[1]Lien Law § 202-a.

[2]Lien Law § 202-a.

[3]§ 76.

[4]Lien Law § 202(1).

be posted in public place)

In particular circumstances, the Lien Law provides that liened personal property may be sold at a private sale, as in the case of the lien of a self-service storage facility owner,[1] or generally, where the property is of a certain monetary value.[2] Where the property is of a certain monetary value, notice of such sale must be posted at least 20 days prior in a conspicuous place on the premises where the personal property was left or delivered by the owner.[3] The notice must specify the time and place of sale and contain either the name and address of the owner and a brief description of the property[4] or provide that all property left on or before a specified date will be subject to sale.[5]

Additionally, where there are surplus proceeds after the sale of liened property, a notice that such proceeds are held by the lienor must be served upon the owner, or his assignee or legal representative, or upon any person entitled to notice of the sale.[6]

§ 74 Notice of private sale; vehicle to be dismantled or scrapped

Research References

West's Key Number Digest, Liens ⚷17 to 22

Am. Jur. Legal Forms 2d §§ 165:36, 165:37 (Notice of sale to satisfy lien—To be posted in public place)

Notwithstanding the provisions for notice of sale of personal property,[1] the sale of a motor vehicle having a wholesale value, taking into consideration the condition of the vehicle, of less than $500 to satisfy a lien for towing and storage under the Lien Law[2] may be made directly to a registered vehicle dismantler or licensed scrap processor on the condition that the motor vehicle may never be titled again and must be dismantled or scrapped.[3] Such sale may not occur prior to 30 days after notice is mailed pursuant to the Lien Law,[4] or 60 days after

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[Section 73]

[1]§ 60.

[2]§ 75.

[3]Lien Law § 202(2).

[4]Lien Law § 202(2)(a).

[5]Lien Law § 202(2)(b).

[6]§ 64.

[Section 74]

[1]Lien Law § 202(1), (2), discussed at §§ 72, 73.

[2]Lien Law § 184, discussed at N.Y. Jur. 2d, Garages, Parking, and Filling Stations § 79.

[3]Lien Law § 202(3).

[4]Lien Law § 201, discussed at §§ 66 to 69.

the date of the initial tow, whichever is later.[5]

c. Manner and Place of Sale

§ 75 Generally; allowance for private sale

Research References

West's Key Number Digest, Liens ⚷17 to 22

Each sale of personal property, in satisfaction of a lien thereon, of a value of $100 or more, or of any security, must be at a public auction to the highest bidder in the city or town where the lien was acquired.[1]

Personal property, except securities, of a value less than $100 may be sold at a bona fide private sale in the city or town where the lien was acquired, no sooner than six months after the time payment to discharge the lien was required by the notice served.[2]

§ 76 Publication of notice of sale; waiver

Research References

West's Key Number Digest, Liens ⚷17 to 22

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 1 (Notice to Public of Sale of Personal Property to Satisfy Lien)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 2 (Complaint by Rightful Possessor of Auto Against Possessory Lienholders for Wrongful Conversion)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 3 (Complaint by Owner of Auto Against Possessory Lienholders for Wrongful Conversion)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 4 (Attorney's Affidavit in Support of Motion for Partial Summary Judgment in Action Against Possessory Lienholders for Wrongful Conversion of Automobile)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 5 (Rightful Possessor's Affidavit in Support of Motion for Partial Summary Judgment in Action Against Possessory Lienholders for Wrongful Conversion of Automobile)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 202 Form 6 (Owner's Affidavit in Support of Motion for Partial Summary Judgment in Action Against Possessory Lienholders for Wrongful Conversion of Auto-

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[5]Lien Law § 202(3).

[Section 75]

[1]Lien Law § 202(1).

As to what constitutes a security, generally, under the sales provisions of the McKinney's Lien Law, see § 59.

As to the manner of sale of goods subject to the statute governing liens of owners of self-service storage facilities, see § 60.

[2]Lien Law § 202(2).

As to service of notice of private sale, see § 73.

mobile)

The Lien Law provides that after the time for the payment of the amount of the lien specified in the notice required to be served,[1] a further notice of such sale, describing the property to be sold, and stating the name of the owner or person for whose account the same is then held and the time and place of such sale, must be published once each week, for two consecutive weeks, in a newspaper published in the town or city where such sale is to be held, and such sale must be held not less than 15 days from the first publication.[2] Notice of a sale that is published in a newspaper having circulation in the town where the lien attaches complies with the statute even though the newspaper is published elsewhere.[3]

◆ **Illustrations:** A notice of lien and sale, first published on September 19, and the subsequent sale, held on October 3, violated the applicable statute[4] that states that such sale may be held not less than 15 days from the first publication, inasmuch as excluding the first day and including the last, the sale took place 14 days from the first publication.[5] Additionally, garage owners violated the applicable statute[6] when they sold an automobile for unpaid storage bills at an auction sale only 14 days after their first publication of sale.[7]

If there is no newspaper published in such town, the notice must be posted at least 10 days before such sale in not less than six conspicuous places therein.[8]

A notice of sale or advertisement by publication may be expressly waived,[9] but a provision in a pledge contract for public or private sale is not a waiver.[10]

[Section 76]

[1] § 66.

[2] Lien Law § 202(1).

[3] Lewis v. Jim's Boat Yard, Inc., 73 Misc. 2d 24, 341 N.Y.S.2d 28 (Dist. Ct. 1973).

[4] Lien Law § 202(1).

[5] Lewis v. Jim's Boat Yard, Inc., 73 Misc. 2d 24, 341 N.Y.S.2d 28 (Dist. Ct. 1973).

[6] Lien Law § 202(1).

[7] Ingram v. Machel and Jr. Auto Repair, Inc., 148 A.D.2d 324, 538 N.Y.S.2d 539 (1st Dep't 1989).

[8] Lien Law § 202.

[9] In re Kiamie's Estate, 309 N.Y. 325, 130 N.E.2d 745 (1955).

Jacobs v. National Bank of Far Rockaway, 208 Misc. 923, 13 N.Y.S.2d 60 (Sup 1939).

[10] Jones v. National Chautauqua County Bank of Jamestown, 272 A.D. 521, 74 N.Y.S.2d 498 (4th Dep't 1947).

As to the distinction between a pledge and a lien, see § 2.

V. ACTION TO FORECLOSE CHATTEL LIEN

A. IN GENERAL

Research References

West's Key Number Digest

Liens ⚷7, 8, 11, 22

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Mortgages
West's A.L.R. Digest, Liens ⚷7, 8, 11, 22

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 82 to 94
C.J.S., Liens §§ 46 to 59

Forms

Am. Jur. Pleading and Practice Forms, Liens § 50
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 206 Form 1

1. Nature of Action; Equity Foreclosure

§ 77 Generally

Research References

West's Key Number Digest, Liens ⚷7, 22

A chattel-lien foreclosure action is in the nature of an action in rem insofar as the object of the suit is the application of the chattel security to the payment of the debt.[1] However, since a personal judgment for a deficiency is sought therein, it is an action in personam.[2] The twofold aspect of the action bears upon the questions of who are necessary and proper parties to the action and what form the service of the summons may take.[3] While at common law there was no remedy for the enforcement of a common-law lien beyond retaining possession,[4] equity foreclosure was generally allowed to cut off the owner's right of redemption.[5] Foreclosure of a lien may be either an equitable or a statutory proceeding.[6]

[Section 77]

[1] § 56.

[2] § 103.

[3] §§ 84 to 88.

[4] Chatfield v. Campbell, 35 Misc. 355, 71 N.Y.S. 1004 (Sup 1901), aff'd, 75 A.D. 631, 78 N.Y.S. 1113 (4th Dep't 1902).

As to the creation and attachment of common-law liens, generally, see § 11.

[5] § 79.

[6] Chatfield v. Campbell, 35 Misc. 355, 71 N.Y.S. 1004 (Sup 1901), aff'd, 75 A.D. 631, 78 N.Y.S. 1113 (4th Dep't 1902).

For discussion of foreclosure of mortgages upon real property, see N.Y.

§ 78 Contractual right to foreclose; default

Research References

West's Key Number Digest, Liens ⟜22

Where the lien is a creature of contract and upon principles of substantive law, the debt or obligation that is secured must be due and payable.[1] The right to foreclose upon a chattel lien accrues upon the failure of the owner of the chattel to pay the debt or perform the obligation secured according to the terms of a contract[2] unless a security agreement otherwise provides.[3] Since the extent of the lien must be measured by the amount due at the time the foreclosure action is commenced, if there is nothing then due, there is no lien that can be foreclosed.[4] An action is prematurely brought as to money loaned on the security of chattels where the loan was to be repaid only when the borrower obtained payment on certain contracts that he or she had not yet received.[5]

If the contract, or security agreement, clearly confers a right on the lienor to take possession and to foreclose upon default of an installment payment, he or she may do so.[6] However, if the condition is to pay the indebtedness, the lienor must wait until default in the final installment.[7]

Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 891.

As to foreclosure of liens on real property, generally, see N.Y. Jur. 2d, Mechanics' Liens §§ 156 to 338.

[Section 78]

[1]Shepard & Morse Lumber Co. v. Franklin Trust Co., 55 A.D. 627, 66 N.Y.S. 766 (3d Dep't 1900) (chattel mortgage).

As to the plaintiff's burden of proof on foreclosure, see § 98.

[2]Bloomingdale v. Braun, 80 Misc. 527, 141 N.Y.S. 590 (App. Term 1913) (conditional sale).

Independent Brewing Co. v. Durston, 55 Misc. 498, 106 N.Y.S. 686 (County Ct. 1907) (chattel mortgage).

[3]Mitchell v. Dane, 129 N.Y.S. 404 (App. Term 1911).

[4]Jacob Bros. Co. v. Gottehrer, 170 N.Y.S. 66 (App. Term 1918).

[5]Stultz v. Gamble, 180 N.Y.S. 424 (App. Term 1920).

[6]Jacob Bros. Co. v. Gottehrer, 170 N.Y.S. 66 (App. Term 1918).

Furman v. Melnick, 154 N.Y.S. 100 (App. Term 1915) (chattel mortgage).

[7]Earle v. Gorham Mfg. Co., 2 A.D. 460, 37 N.Y.S. 1037 (1st Dep't 1896) (chattel mortgage).

Carter v. Phillips, 127 Misc. 903, 217 N.Y.S. 621 (Sup 1926) (chattel mortgage).

Corrigan v. Sammis, 65 Misc. 473, 120 N.Y.S. 69 (App. Term 1909) (chattel mortgage).

Under a chattel mortgage given to secure a certain sum payable in installments represented by a number of notes that were payable at a designated place, the mortgagor is not in default so as to authorize the foreclosure where at the time of the maturity of a note he had on deposit with the trust company, designated as the place of payment, an amount exceeding the sum due on the note and had instructed the trust company to pay

§ 79 Equity foreclosure

Research References
West's Key Number Digest, Liens ⟹7, 22

Since equity has brought into existence liens unknown to the common law, it can enforce them by whatever means they will be rendered more efficacious in doing justice to the parties interested.[1] In general, any lienor, except in the case of purely possessory common-law liens not defined by statute,[2] including a statutory lienor, may foreclose in equity when equitable grounds are found unless an exclusive statutory remedy exists.[3] The Lien Law provisions governing extrajudicial sale[4] do not preclude any other remedy by action or otherwise, now existing, for the enforcement of a lien against personal property.[5] Similarly, those sections of the Lien Law governing foreclosure by action do not affect any existing right or remedy to foreclose or satisfy a lien upon, or security interest in, a chattel without action.[6]

2. Statutory Foreclosure

§ 80 Generally

Research References
West's Key Number Digest, Liens ⟹8, 22
Am. Jur. Pleading and Practice Forms, Liens § 50 (Answer—Running of statute of limitations as bar to action for foreclosure)

In most instances, foreclosure under the general provisions of the Lien Law[1] is available, and most of the former common-law liens are within the scope of the Lien Law.[2] An action may be maintained to foreclose a lien upon a chattel, for a sum of money, in any case where

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the note upon presentation, the note, however, never having been presented for payment. Wazen v. Duggan, 186 N.Y.S. 394 (Sup 1921), aff'd. 197 A.D. 922, 188 N.Y.S. 956 (4th Dep't 1921).

If no time for payment of the debt secured by a chattel mortgage is fixed, it is payable immediately upon execution of the mortgage, no demand for payment is requisite, and the mortgage may be foreclosed at any time. Stearns v. Oberle, 47 Misc. 349, 94 N.Y.S. 37 (App. Term 1905).

[Section 79]

[1]Am. Jur. 2d, Liens § 82.

[2]§ 11.

[3]Chatfield v. Campbell, 35 Misc. 355, 71 N.Y.S. 1004 (Sup 1901), aff'd, 75 A.D. 631, 78 N.Y.S. 1113 (4th Dep't 1902).

As to enforcement of equitable liens, generally, see § 54.

[4]§§ 57, 58.

[5]§ 56.

[6]§ 58.

[Section 80]

[1]Lien Law §§ 206 to 211.

[2]§ 23.

such a lien exists at the commencement of the action.[3] However, the general foreclosure provisions do not apply to a case where another mode of enforcing a lien upon a chattel is specially prescribed by law.[4] The fact that a common-law statutory or possessory lien may be enforced by the general provisions of the Lien Law for extrajudicial sale does not exclude enforcement by a foreclosure action.[5] An action may be maintained to foreclose a lien upon a chattel, for a sum of money, in any case where such a lien exists at the commencement of the action.[6] If the lien is in existence at the time of the commencement of the action, it may be enforced under this law even though an action on the debt is barred by the statute of limitations.[7]

§ 81 Jurisdiction of court

Research References

West's Key Number Digest, Liens ⚷22

An action to foreclose a lien upon a chattel may be brought in any court of record, or not of record, that would have jurisdiction to render a judgment, in an action founded upon a contract, for a sum equal to the amount of the lien.[1]

> ◆ **Illustrations:** The statute governing actions to foreclose a lien[2] permits a justice court to entertain a counterclaim properly before it to the extent of $1,000, and any excess above that sum is deemed waived.[3]

As in other actions, the court, assuming that it has the power to foreclose a chattel lien, must have jurisdiction of the chattel.[4]

§ 82 Applicable procedure

Research References

West's Key Number Digest, Liens ⚷22

The procedure in an action to foreclose a mortgage on real property,

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[3] Lien Law § 206.

[4] Lien Law § 210.

[5] § 56.

[6] § 77.

[7] Hutson v. Title Guarantee & Trust Co., 118 Misc. 795, 195 N.Y.S. 316 (Sup 1922).

[Section 81]

[1] Lien Law § 206.

[2] Lien Law § 206.

[3] Harlee-Mitchell Camp Corp. v. Granite Lake Camp, Inc., 35 A.D.2d 551, 313 N.Y.S.2d 184 (2d Dep't 1970).

[4] Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

insofar as it may apply, is applicable in actions to foreclose mortgages or other liens on chattels or other personal property.[1] When a chattel lien is foreclosed in an equitable action, the form of the pleadings, the mode of procedure, and the jurisdiction of the courts are necessarily the same as in actions to foreclose a mortgage on real property[2] except as modified by the Lien Law.[3]

§ 83 Property subject to chattel-lien foreclosure

Research References

West's Key Number Digest, Liens ⚷11, 22

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 206 Form 1 (Complaint to Foreclose Security Interest Created by a Security Agreement in Personal Property)

For purposes of the provisions governing foreclosure by action of a lien upon chattel, the following are deemed liens upon chattel, enforceable by a foreclosure action:

- a chattel mortgage to secure the payment of a loan of money or other debt, or the purchase price of chattels
- a contract of conditional sale of personal property[1]
- a hiring of personal property, where title is not to vest in the person hiring until the payment of a certain sum
- a security interest created by a security agreement in personal property[2]

B. PROCEDURE

Research References

West's Key Number Digest

Liens ⚷9, 12, 16, 22

[Section 82]

[1]Lien Law § 206.

As to mortgage foreclosure on real property, generally, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 891.

[2]Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

[3]Lien Law §§ 207 to 211.

[Section 83]

[1]Lien Law § 206.

[2]Lien Law § 206.

Where a chattel mortgage is executed as security for notes covering farm equipment, crops, and cattle, and the mortgagees take a bill of sale upon default on the notes, they may be compelled to account for income received and proceeds derived from a resale of the property; the bill of sale will be construed as merely additional security and the excess over the indebtedness will be returned to the mortgagor. Kelley v. Farmers Production Credit Ass'n, 88 N.Y.S.2d 872 (Sup 1948).

A.L.R. Library

A.L.R. Index, Liens and Encumbrances; Mortgages
West's A.L.R. Digest, Liens ⚿9, 12, 16, 22

Legal Encyclopedias

Am. Jur. 2d, Liens §§ 83 to 94
C.J.S., Liens §§ 46 to 59

Forms

Am. Jur. Pleading and Practice Forms, Liens §§ 26, 27, 45, 46, 49 to 51, 64, 66, 68, 69, 75, 76, 81, 87, 88, 93 to 95
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 208 Form 1

1. Commencement of Action; Parties and Pleading

§ 84 Generally; summons

Research References

West's Key Number Digest, Liens ⚿22
Am. Jur. Pleading and Practice Forms, Liens § 64 (Summons—In action to foreclose lien)
West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 208 Form 1 (Judgment to Foreclose Security Interest Created by a Security Agreement in Personal Property)

In view of the express provision of the Lien Law that the procedure to foreclose a mortgage on real property, insofar as applicable, applies in actions to foreclose a chattel lien,[1] the lien foreclosure action is commenced in the usual manner by service of process and does not differ materially from the commencement of a foreclosure of a real property mortgage.[2] As with the real property foreclosure, the action may be in personam, and require personal jurisdiction, insofar as a personal judgment is sought[3] and in rem insofar as foreclosure alone is concerned.[4]

In general, the process in an action to foreclose a lien upon a chattel is governed by the rules applicable in an ordinary civil action.[5] The Lien Law expressly requires personal service of the summons upon a defendant against whom it is sought to obtain a judgment awarding

[Section 84]

[1] § 82.

[2] As to mortgage foreclosure on real property, generally, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 8914.

[3] § 103.

[4] § 56.

[5] As to service of process, generally, see N.Y. Jur. 2d, Process and Papers §§ 1 et seq.

payment of the lien.[6]

§ 85 Parties

Research References
West's Key Number Digest, Liens ⚷22

The rules applicable to parties in an ordinary civil action apply generally in an action to foreclose a lien upon a chattel; in general, all parties interested in the property should be joined in a foreclosure action,[1] but a lienor need not join those persons who are not named in the notice of lien and have no interest in the property at the time of the suit for foreclosure thereon.[2] The owner of the chattel is a necessary party in a foreclosure action[3] as is one having a right to the possession thereof subject to the plaintiff's lien.[4] Defendants claiming a lien and defending an action to establish and foreclose an equitable lien on the same property are proper parties to the action, where they claim an interest therein subsequent to the plaintiff's lien.[5] Likewise, a third person in possession of a chattel sold on contract of conditional sale is a proper party to a foreclosure in order that the third party's rights, if he or she claims under the conditional buyer, may not be prejudiced.[6]

So far as joining a person as a defendant for the purpose of obtaining a deficiency judgment, it cannot be said that he or she is a necessary party as it is optional with the plaintiff whether he or she will elect the relief.[7]

The rule that to bind a person by a judgment foreclosing a lien, he or she must be made a party to the action has no application to a party who acquires some interest or claim in or to the property during the pendency of the foreclosure action, particularly if such person had

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[6]Lien Law § 208.

As to deficiency judgments, see § 103.

[Section 85]

[1]Griffin v. Armsted, 143 N.Y.S. 770 (Sup 1913), aff'd, 162 A.D. 936, 147 N.Y.S. 1114 (4th Dep't 1914), decision amended on other grounds, 163 A.D. 934, 147 N.Y.S. 1114 (4th Dep't 1914).

[2]Melniker v. Grae, 82 A.D.2d 798, 439 N.Y.S.2d 409 (2d Dep't 1981).

[3]Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

A.L. Gosselin Corporation v. Mario Tapparelli fu Pietro of America, 191 A.D. 580, 181 N.Y.S. 883 (1st Dep't 1920), aff'd, 229 N.Y. 596, 129 N.E. 922 (1920) (subsequent transferee of bonds).

[4]Mathushek & Son Piano Co. v. Weld, 94 Misc. 282, 158 N.Y.S. 169 (App. Term 1916).

[5]Deering v. Schreyer, 171 N.Y. 451, 64 N.E. 179 (1902).

[6]Singer Sewing Mach. Co. v. Leipzig, 113 N.Y.S. 916 (App. Term 1908).

[7]§ 56.

notice of the pending action.[8]

§ 86 Complaint

Research References

West's Key Number Digest, Liens ⚷22

Am. Jur. Pleading and Practice Forms, Liens §§ 26, 27 (Complaint, petition, or declaration—To foreclose lien), 46 (Complaint, petition, or declaration—Allegation—Notice of lien filed)

The pleadings in an action to foreclose a chattel lien are governed by the rules relating to pleadings in an ordinary action.[1] The complaint is similar in form to that in an action to foreclose a mortgage on real property[2] but should allege all facts necessary to establish the lien claimed.[3] Facts necessary to establish the line claim include:

- if the lien is a statutory compliance with the statute[4]
- the amount of the indebtedness[5]
- the failure of the defendant to pay the indebtedness[6]
- that the plaintiff is the holder of the lien
- an assignment of a chattel mortgage to the plaintiff[7]
- a description of the chattel in question with sufficient definiteness to identify it[8]

Where interests have subsequently accrued, the complaint should allege that certain named defendants have, or claim to have, some title, lien, or interest in the chattel that is subsequent and subordinate

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[8]Hovey v. Elliott, 118 N.Y. 124, 23 N.E. 475 (1890).

[Section 86]

[1]N.Y. Jur. 2d, Pleading §§ 1 et seq.

[2]Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

As to mortgage foreclosures on real property, generally, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 471 to 891.

[3]A.L. Gosselin Corporation v. Mario Tapparelli fu Pietro of America, 191 A.D. 580, 181 N.Y.S. 883 (1st Dep't 1920), aff'd, 229 N.Y. 596, 129 N.E. 922 (1920).

Battery Place Commercial Corp. v. Willis, 183 A.D. 569, 170 N.Y.S. 772 (1st Dep't 1918).

[4]Simpson Crawford Co. v. Knight, 130 N.Y.S. 236 (App. Term 1911).

[5]Beers v. Waterbury, 21 N.Y. Super. Ct. 396 (1861) (chattel mortgage).

[6]Conkling v. Weatherwax, 181 N.Y. 258, 73 N.E. 1028 (1905).

Shepard & Morse Lumber Co. v. Franklin Trust Co., 55 A.D. 627, 66 N.Y.S. 766 (3d Dep't 1900).

Bellom v. Schindler, 130 Misc. 503, 224 N.Y.S. 429 (Mun. Ct. 1927).

For discussion of immaturity of obligation or want of default in defense to action of foreclosure, see § 78.

[7]Griffin v. Armsted, 143 N.Y.S. 770 (Sup 1913), aff'd, 162 A.D. 936, 147 N.Y.S. 1114 (4th Dep't 1914), decision amended on other grounds, 163 A.D. 934, 147 N.Y.S. 1114 (4th Dep't 1914).

[8]General Electric Co. v. Wightman, 3 A.D. 118, 39 N.Y.S. 420 (4th Dep't 1896).

to the plaintiff's lien. A general allegation to such effect will suffice.[9] Additionally, where an action is brought by a mortgagee in his or her own name and the chattel mortgage is executed to him or her under an assumed name, the complaint should allege that the mortgage was made to the plaintiff doing business under such assumed name.[10]

§ 87 Answer

Research References

West's Key Number Digest, Liens ⚷22

Am. Jur. Pleading and Practice Forms, Liens § 50 (Answer—Running of statute of limitations as bar to action for foreclosure)

In response to the complaint in an action of foreclosure upon a chattel lien, the answer, as in an ordinary civil action,[1] should deny each material allegation controverted by the defendant or any knowledge or information thereof sufficient to form a belief. Allegations of complaint in a foreclosure of a chattel mortgage are conclusively admitted by failure to deny them.[2] The answer may also contain a statement of new matter constituting a defense, such as the invalidity of the chattel mortgage, or a counterclaim.[3] Affirmative defenses must be pleaded as such in the answer,[4] and the defendant in a chattel-mortgage foreclosure must allege facts constituting a setoff.[5]

§ 88 Cross-claim and counterclaim

Research References

West's Key Number Digest, Liens ⚷22

Am. Jur. Pleading and Practice Forms, Liens § 49 (Counterclaim—For recovery of property in lienor's possession—For damages—Demand by lienor in excess of amount due as constituting waiver of lien)

A defendant in an action to foreclose a lien upon a chattel may in

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[9]Albany City Nat. Bank v. Hudson River Brick Mfg. Co., 29 N.Y.S. 793 (Gen. Term 1894).

[10]Griffin v. Armsted, 143 N.Y.S. 770 (Sup 1913), aff'd, 162 A.D. 936, 147 N.Y.S. 1114 (4th Dep't 1914), decision amended on other grounds, 163 A.D. 934, 147 N.Y.S. 1114 (4th Dep't 1914).

[Section 87]

[1]N.Y. Jur. 2d, Pleading §§ 118 to 155.

[2]McCrea v. Hopper, 35 A.D. 572, 55 N.Y.S. 136 (1st Dep't 1898) aff'd, 165 N.Y. 633, 59 N.E. 1125 (1901).

[3]Blake v. Corbett, 120 N.Y. 327, 24 N.E. 477 (1890).

As to defenses in actions to enforce a lien, generally, see §§ 93 to 96.

For discussion of counterclaims, see § 88.

[4]Ostrander v. Weber, 114 N.Y. 95, 21 N.E. 112 (1889).

[5]Hanson v. Kassmayer, 91 N.Y.S. 755 (App. Term 1905).

his or her answer demand affirmative relief as respects a cause of action against the plaintiff.[1] No affirmative judgment can be awarded to the conditional buyer where no counterclaim is pleaded.[2] Similarly, cross-claims are allowed. The broad policy of the Civil Practice Law and Rules favoring cross-claims should not be frustrated unless the procedures for foreclosing liens would be disrupted by so doing or some provision of the Lien Law so requires.[3]

2. Seizure of Chattel

§ 89 Generally; warrant of seizure

Research References

West's Key Number Digest, Liens ⟹22

Am. Jur. Pleading and Practice Forms, Liens §§ 66 (Order—For warrant of seizure of chattel upon which plaintiff seeks to foreclose lien), 68, 69 (Warrant of seizure—Commanding sheriff to seize chattels on which lien is claimed)

If the plaintiff is not in possession of the chattel, a warrant may be granted by the court, or a judge thereof, commanding the sheriff, or such enforcement officer as is provided by law to execute the mandates of the particular court, to seize the chattel and safely keep it to abide the final judgment in the action.[1] The issuance of a warrant of seizure is justified if the plaintiff in a proceeding for the foreclosure of a chattel mortgage is out of possession. No further condition is imposed.[2] The provisions of the Civil Practice Law and Rules, and the provisions of the court act governing practice in the particular court, relating to an order of attachment, apply to warrants of seizure, to the proceedings to procure it, and after it has been issued except as otherwise expressly provided by the enforcement provisions of the Lien Law.[3] However, compliance is not required with those provisions that apply

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[Section 88]

[1]McCrea v. Hopper, 35 A.D. 572, 55 N.Y.S. 136 (1st Dep't 1898), aff'd, 165 N.Y. 633, 59 N.E. 1125 (1901).

P. & M. Motor Car Co. v. Paris, 185 N.Y.S. 835 (App. Term 1921) (damages for fraud against chattel mortgagee).

[2]Studebaker Corporation of America v. Silverberg, 199 N.Y.S. 190 (App. Term 1923).

[3]Vogel Bros. Contracting Corp. v. Town of Oyster Bay, 50 Misc. 2d 401, 270 N.Y.S.2d 431 (Sup 1966).

[Section 89]

[1]Lien Law § 207.

[2]Coiro v. Baron, 158 A.D. 591, 143 N.Y.S. 853 (2d Dep't 1913).

[3]Lien Law § 207.

Where the undertaking given to obtain a "warrant of foreclosure" provided for the payment by the plaintiff to the defendants of costs and damages that the defendants might sustain by reason of the foreclosure, but failed to provide that the plaintiff would indemnify them from damages suffered from the vacating of the

peculiarly to a warrant of attachment.[4] An affidavit for a warrant of seizure need not state that the claim is due over and above all counterclaims known to the affiant as required in the case of warrants of attachment.[5] In passing upon the sufficiency of the affidavit, the statute should be construed with reasonable liberality.[6]

§ 90 Action in inferior court

Research References

West's Key Number Digest, Liens ⚷22

Am. Jur. Pleading and Practice Forms, Liens §§ 68, 69 (Warrant of seizure—Commanding sheriff to seize chattels on which lien is claimed)

Where the action is brought in a court, other than one of those statutorily specified,[1] if the plaintiff is not in possession of the chattel, a warrant, commanding the proper officer to seize the chattel and safely keep it to abide the judgment, may be issued in like manner as a warrant of attachment may be issued in an action founded upon a contract brought in the same court.[2] The law applicable to attachment in that court applies to the warrant of seizure, to the proceedings to procure it, and after it has been issued except as otherwise specified in the judgment.[3]

§ 91 Discharge or vacation of warrant

Research References

West's Key Number Digest, Liens ⚷16, 22

Notwithstanding the power of the court to issue a warrant of seizure

warrant of seizure, the undertaking was insufficient and justified the refusal of the warrant. People ex rel. Paul G. Mehlin & Sons Piano Co. v. Lauer, 80 Misc. 438, 141 N.Y.S. 296 (Sup 1913).

For discussion of courts in which a foreclosure action may be maintained, see § 81.

As to foreclosure actions in inferior courts, see § 90.

[4]Coiro v. Baron, 158 A.D. 591, 143 N.Y.S. 853 (2d Dep't 1913), following Wuertz v. Braun, 113 A.D. 459, 99 N.Y.S. 340 (2d Dep't 1906).

[5]Coiro v. Baron, 158 A.D. 591, 143 N.Y.S. 853 (2d Dep't 1913).

People ex rel. Paul G. Mehlin & Sons Piano Co. v. Lauer, 80 Misc. 438, 141 N.Y.S. 296 (Sup 1913).

[6]Lomin Corp. v. Kohlhepp, 151 Misc. 545, 271 N.Y.S. 709 (Mun. Ct. 1934).

[Section 90]

[1]Lien Law § 209, probably referring to former Lien Law § 207, repealed by 1964 N.Y. Laws Ch. 960 § 1.

[2]Lien Law § 209.

As to grounds for an order of attachment, generally, see N.Y. Jur. 2d, Creditors' Rights and Remedies §§ 35 to 44.

[3]Lien Law § 209.

For discussion of judgment of foreclosure in an action in inferior court, see § 101.

of chattel in proceedings to enforce a lien thereon,[1] the defendant in an action to foreclose a lien may, under the appropriate statute, and upon the security required, apply for the discharge of a warrant of seizure.[2]

A warrant of seizure void on its face may be vacated.[3] On the other hand, if the warrant of seizure is sufficient on its face, the disposal of the warrant must await the trial of the action.[4]

§ 92 Receivership

Research References

West's Key Number Digest, Liens ⚷22

In a proper case, a receiver may be appointed in a foreclosure action[1] in lieu of seizure of the chattel.[2] If a receiver is already in possession and can fully protect the plaintiff's interests, such receivership should be extended.[3]

3. Defenses

§ 93 Generally

Research References

West's Key Number Digest, Liens ⚷22

Am. Jur. Pleading and Practice Forms, Liens §§ 50 (Answer—Running of statute of limitations as bar to action for foreclosure), 51 (Answer—Defense-Lien extinguished by unaccepted tender of payment)

An action to foreclose a lien upon a chattel is open to any defense

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[Section 91]

[1] § 89.

[2] Quon Kee v. Hip Sing Tong Soc., 25 Misc. 320, 54 N.Y.S. 570 (City Ct. 1898).

As to annulment, vacation, or modification of attachment order and discharge of property upon substitution of security, generally, see N.Y. Jur. 2d, Creditors' Rights and Remedies §§ 156 to 182.

[3] Grossman v. Weiss, 129 Misc. 234, 221 N.Y.S. 266 (App. Term 1927).

[4] Karp v. Bass & Bass, 107 Misc. 217, 177 N.Y.S. 462 (City Ct. 1919).

[Section 92]

[1] Ostrander v. Weber, 114 N.Y. 95, 21 N.E. 112 (1889).

Hof v. Mager, 168 A.D. 318, 154 N.Y.S. 60 (2d Dep't 1915).

[2] Marcus v. Sherr, 132 Misc. 734, 230 N.Y.S. 425 (City Ct. 1928).

For discussion of warrant of seizure, see § 89.

[3] Farmers' Loan & Trust Co. v. Hotel Brunswick Co., 12 A.D. 626, 42 N.Y.S. 350 (1st Dep't 1896) (where a receiver had been appointed in voluntary dissolution proceedings of the defendant corporation).

tending to show that no lien ever existed[1] or that, if it once existed, a lien no longer exists.[2] If the obligation or debt upon which the lien is based is not due and payable, or if the right to foreclose is contractually conditioned upon a default that has not occurred, there is no lien to foreclose.[3] However, neither the partial failure of consideration on a contract creating a lien[4] nor the defendant's failure to execute the chattel mortgage when its possession of the chattel and default under the mortgage are undisputed[5] is a defense to foreclosure.

◆ **Illustration:** The fact that a corporation, to which the plaintiff bank made loans secured by a security agreement covering restaurant equipment, had not yet filed its certificate of incorporation at the time the security agreement and the first cash advance were made does not constitute an affirmative defense to the plaintiff's action to recover on its security interest from the defendants, the purchasers of the equipment at a mortgage foreclosure sale.[6]

The voluntary surrender of a chattel by the lienor, where continued possession is essential to the existence of the lien, is clearly a defense.[7]

§ 94 Unperfected security interest

Research References

West's Key Number Digest, Liens ⚷9, 22

For purposes of enforcement of chattel liens by action of foreclosure under the Lien Law, security interests in personal property, created by a security agreement, are treated as liens upon the chattel.[1] While the Uniform Commercial Code does not require filing of all security interests, failure to perfect a security interest may be a defense to an

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[Section 93]

[1]Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

Ament v. Zaharion, 206 A.D. 143, 200 N.Y.S. 595 (1st Dep't 1923).

General Motors Acceptance Corp. v. Barnett, 142 Misc. 192, 254 N.Y.S. 166 (Mun. Ct. 1931).

[2]Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903).

Hanson v. Kassmayer, 91 N.Y.S. 755 (App. Term 1905).

As to burden of proof in foreclosure actions, see § 98.

[3]§ 78.

[4]Saltzman v. Neuman, 263 A.D. 832, 31 N.Y.S.2d 528 (2d Dep't 1941).

As to liens created by contract, generally, see § 17.

[5]Wuertz v. Braun, 122 A.D. 433, 107 N.Y.S. 429 (2d Dep't 1907).

[6]Bankers Trust Co. of Western New York v. Zecher, 103 Misc. 2d 777, 426 N.Y.S.2d 960, 29 U.C.C. Rep. Serv. 323 (Sup 1980) (doctrine of de facto corporation applicable).

[7]Gage v. Callanan, 128 A.D. 752, 113 N.Y.S. 227 (3d Dep't 1908).

For discussion of surrender of possession, see § 48.

[Section 94]

[1]§ 83.

action of foreclosure. Insufficient compliance with a statute requiring the filing of a conditional sales contract is a defense of a purchaser of the chattel in good faith and for value without notice.[2] It is not a defense to a purchaser of mortgaged chattels, who had notice of the mortgage at the time of the purchase, that the mortgagee neglected or omitted to file the mortgage.[3]

§ 95 Waiver of default

Research References

West's Key Number Digest, Liens ⚷16, 22

In general, the right to foreclose upon a chattel lien accrues upon the failure of the owner of the chattel to pay the debt or perform the obligation secured according to the terms of a contract.[1] An extension of the time of payment is a valid defense to an action of foreclosure provided that it is founded upon a legal consideration. However, the right of a conditional vendor or mortgagee of chattels to foreclose upon default is not waived by having accepted payments that were waivers of prior defaults.[2] Additionally, it is no defense to an action to foreclose a chattel mortgage that the time of the defendant has been extended, where the extension was made after it was due and on the mere promise of the mortgagor to pay the debt at a later date, since such promise is without consideration.[3] While there may be a waiver of the right, without notice and demand of payment, to exercise the privilege conferred by a default clause in a mortgage making failure to pay an installment a breach of the entire contract and authorizing the mortgagee to declare the whole sum then remaining unpaid immediately due and payable, the fact that the mortgagor defaults in making payments, making them in amounts and at times other than

[2]Ament v. Zaharion, 206 A.D. 143, 200 N.Y.S. 595 (1st Dep't 1923).

General Motors Acceptance Corp. v. Barnett, 142 Misc. 192, 254 N.Y.S. 166 (Mun. Ct. 1931).

Filing of a conditional bill of sale was not essential to the plaintiff's cause of action where defendant, a subsequent purchaser of the chattel, did not claim to have brought it without notice of the existence of the bill of sale. Equitable Auto Sales Co. v. Sherman, 170 N.Y.S. 948 (App. Term 1918).

[3]Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

Where a purchaser of an automobile took it for a past-due debt, he was not in the position of a subsequent purchaser in good faith and for fair consideration, who could take advantage of the fact that the mortgage had not been filed. Gray v. Brasee, 14 N.Y.S.2d 687 (Sup 1939).

[Section 95]

[1]§ 78.

[2]Bloomingdale v. Braun, 80 Misc. 527, 141 N.Y.S. 590 (App. Term 1913) (conditional sale).

[3]Repelow v. Walsh, 98 A.D. 320, 90 N.Y.S. 651 (2d Dep't 1904) (chattel mortgage).

as provided for in the mortgage, does not preclude the mortgagee, upon a subsequent default, from invoking the default provision and maintaining an action to foreclose his lien without first making a demand on the mortgagor for the return of the property.[4]

§ 96 Subordination of lien

Research References
West's Key Number Digest, Liens ⟹12, 22

A chattel mortgage foreclosure action cannot be maintained for the purpose of attacking title to the property covered by a first mortgage, or lien, in effect denying the validity of the first mortgage.[1] It is a valid defense to such action that the plaintiff is seeking to litigate the validity of paramount or hostile claims to the chattel.[2] Nevertheless, there may be instances in which the very question to be decided is whether the rights of a defendant in a foreclosure suit are superior or subordinate to those of the lienor, and in such cases, a court must logically have the right to decide the question upon which its jurisdiction depends.[3]

4. Trial

§ 97 Generally; jury trial

Research References
West's Key Number Digest, Liens ⟹22

In an action for the enforcement of a lien, there should be a hearing on the issues of fact raised by the pleadings that is conducted under the rules governing trials generally.[1] A proceeding for the foreclosure of a lien is ordinarily regarded as one of equitable cognizance in which, in the absence of statute, neither party has a right to demand a jury

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[4]Kraus v. Black, 56 Misc. 641, 107 N.Y.S. 609 (App. Term 1907).

[Section 96]

[1]Niccloy v. Treasure, 115 N.Y.S. 1030 (Sup 1909).

[2]Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

Strong v. Dahm, 39 N.Y.S.2d 266 (Sup 1942).

A junior mortgagee of chattels is entitled to foreclose his or her mortgage in equity where he or she also seeks to redeem from a foreclosure by the holder of the senior mortgage by the exercise of a power of sale incorporated in the mortgage, the sale not having been fairly conducted. Fleischmann v. Clausen, 222 A.D. 7, 225 N.Y.S. 288 (1st Dep't 1927).

[3]Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

As to priorities among competing liens, generally, see §§ 39 to 44.

[Section 97]

[1]Am. Jur. 2d, Liens § 92.

trial, notwithstanding that the plaintiff seeks a deficiency judgment.[2]

§ 98 Burden of proof

Research References

West's Key Number Digest, Liens ⚷22

The burden of establishing the facts constituting the cause of action of foreclosure to enforce a lien is on the plaintiff.[1] Where a lien is founded on possession, the burden of proving lawful possession is upon the lienor.[2] Until the plaintiff in the foreclosure action has established his or her debt, the plaintiff has no standing to maintain an action for a judgment of foreclosure.[3] On foreclosure of a conditional sale contract against a third party alone, the plaintiff must prove a devolution of interest, an acquisition in some way of the interest of the plaintiff's vendee in the property, or possession of the property by him or her and a refusal after demand either to surrender possession or to pay the balance of the purchase price due thereon in order to sustain a judgment against him or her for the value of the property.[4]

The plaintiff need not prove such facts alleged in the complaint as are not denied,[5] and the burden of proving any affirmative defenses in actions of foreclosure rests upon the defendant.[6] If a defendant claims a setoff, he or she must prove the same.[7]

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[2]Jamaica Sav. Bank v. M. S. Investing Co., 274 N.Y. 215, 8 N.E.2d 493, 112 A.L.R. 1485 (1937).

As to deficiency judgments, see § 103.

[Section 98]

[1]Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903) (attorneys' lien).

Weisl v. James, 120 N.Y.S. 47 (App. Term 1909) (chattel mortgage).

[2]Danzer v. Nathan, 145 A.D. 448, 129 N.Y.S. 966 (2d Dep't 1911).

For discussion of possessory liens, generally, see § 11.

As to the requirement, to foreclose upon a lien, that the debt be due and payable, see § 78.

[3]Shepard & Morse Lumber Co. v. Franklin Trust Co., 55 A.D. 627, 66 N.Y.S. 766 (3d Dep't 1900).

[4]Rosenthal v. Cristal, 45 Misc. 649, 91 N.Y.S. 15 (App. Term 1904).

[5]§ 87.

[6]Tannenbaum v. Schaffer, 122 N.Y.S. 180 (App. Term 1910).

In an action to foreclose a conditional bill of sale against a purchaser from the buyer, if the buyer claims that he or she purchased in good faith for value without notice of the existence of the bill of sale, the buyer must give proof thereof. Equitable Auto Sales Co. v. Sherman, 170 N.Y.S. 948 (App. Term 1918).

General Motors Acceptance Corp. v. Barnett, 142 Misc. 192, 254 N.Y.S. 166 (Mun. Ct. 1931).

As to defenses to action of foreclosure, generally, see § 93.

[7]Hanson v. Kassmayer, 91 N.Y.S. 755 (App. Term 1905), holding that where defendant admits default in the mortgage, but defends on the ground of breach of warranty of title, he is not entitled to

§ 99 Reference on default or admission

Research References

West's Key Number Digest, Liens ⚷22

By virtue of the Lien Law, providing that the procedure in an action foreclosing a mortgage on real property is generally applicable in actions to foreclose a mortgage or other lien on chattels or other personal property,[1] it would appear that the statute authorizing a reference on default or admission in a mortgage foreclosure on real property[2] might under some circumstances be applicable in an action to foreclose a lien upon a chattel.[3]

5. Judgment

§ 100 Generally

Research References

West's Key Number Digest, Liens ⚷22

Am. Jur. Pleading and Practice Forms, Liens §§ 75 (Judgment or decree—Foreclosing lien), 81 (Order—For sale of property seized under warrant), 87 (Return or report of sale—By auctioneer), 88 (Return or report of sale—By sheriff)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 208 Form 1 (Judgment to Foreclose Security Interest Created by a Security Agreement in Personal Property)

In an action to foreclose a chattel lien, other than an action brought in an inferior court,[1] final judgment, in favor of the plaintiff, must specify the amount of the lien or the monetary obligation secured by the security interest.[2] The plaintiff in a mortgage foreclosure is entitled to enter judgment only for the amount due at the time of the decree[3] and, in the absence of an acceleration clause in the contract under which the lien arises, is not entitled to have included in the

judgment without proof of damages, and the mere proof that the goods, or part of them, were seized by a paramount lien claimant is not sufficient, where the existence of a paramount lien is not established.

[Section 99]

[1]§ 82.

[2]N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 651 to 656.

[3]Berkowitz v. D.D. Holding Corp., 229 A.D. 443, 242 N.Y.S. 615 (1st Dep't 1930).

The procedure in an action to foreclose a chattel mortgage is necessarily the same as in an action to foreclose a mortgage upon real property except as modified by statute. Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N.Y. 185, 77 N.E. 38 (1906).

As to references, generally, see N.Y. Jur. 2d, References §§ 1 et seq.

[Section 100]

[1]§ 101.

[2]Lien Law § 208.

[3]Simpson Crawford Co. v. Knight,

judgment any sum not due upon commencement of the action.[4] Final judgment in favor of the plaintiff must also direct a sale of the chattel to satisfy the same and the costs, if any, by a referee appointed thereby, or an officer designated therein, in like manner as where a sheriff sells personal property by virtue of an execution, and the application by him or her of the proceeds of the sale, less fees and expenses, to the payment of the amount of the lien or the monetary obligation secured by the security interest and the costs of the action.[5] Where a chattel mortgage with priority covers more property than was included in a conditional bill of sale, a judgment for the foreclosure of the mortgage should limit the mortgagee to costs payable out of the property and require a sale of all the property covered by the mortgage; otherwise, there would be less chance for a surplus from the chattels that were covered by the conditional bill of sale.[6] The decree of foreclosure of a chattel mortgage or lien should describe the property to be sold thereunder sufficiently to identify it.[7] It must also provide for the payment of the surplus to the owner of the chattel and for the safekeeping of the surplus, if necessary, until it is claimed by the owner.[8] If a defendant, upon whom the summons is personally served, is liable for the amount of the lien or the monetary obligation secured by the security interest, or for any part thereof, a final judgment may also award payment accordingly.[9]

The law allows the molding of a judgment to conditions existing at the time of the judgment. For example, if the plaintiff in an action to foreclose a lien for storage and repairs has possession when the action is commenced, a money judgment will be proper if thereafter the chattel is lawfully taken from him or her by virtue of a prior lien.[10] Similarly, where, pending an action to establish a lien, the property is sold, the lien claimant has a right to a judgment for the amount of his

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130 N.Y.S. 236 (App. Term 1911).

[4]Jacob Bros. Co. v. Gottehrer, 170 N.Y.S. 66 (App. Term 1918).

Where in renewal of a chattel mortgage the mortgagee understates the amount remaining unpaid, as to subsequent purchasers, he is bound by the amount stated, and as to them the judgment will be rendered for this amount, and it is immaterial that the understatement was due to mistake or misapprehension. Beers v. Waterbury, 21 N.Y. Super. Ct. 396 (1861).

[5]Seger & Gross Co. v. Maclaire, 165 N.Y.S. 423 (App. Term 1917).

For discussion of judgment in foreclosure upon real property, see N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 667 to 719.

[6]Seger & Gross Co. v. Maclaire, 165 N.Y.S. 423 (App. Term 1917).

[7]MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N.Y. 92, 85 N.E. 801 (1908).

[8]Lien Law § 208.

[9]Lien Law § 208.

[10]Gage v. Callanan, 128 A.D. 752, 113 N.Y.S. 227 (3d Dep't 1908).

or her lien.[11]

§ 101 Inferior court judgment

Research References

West's Key Number Digest, Liens ⚷22

Where the action of foreclosure upon a chattel lien is brought in an inferior court, the Lien Law provides that a judgment in favor of the plaintiff must correspond to a judgment rendered as otherwise prescribed by the Lien Law[1] except that it must direct the sale of the chattel by an officer to whom an execution, issued out of the court, may be directed, and the payment of the surplus, if its safekeeping is necessary, to the county treasurer, for the benefit of the owner.[2]

§ 102 Sale under judgment of foreclosure

Research References

West's Key Number Digest, Liens ⚷22

Am. Jur. Pleading and Practice Forms, Liens §§ 45 (Complaint in federal court—Diversity of citizenship—For declaration of lien priority and for foreclosure on real property), 76 (Judgment or decree—Foreclosing lien and establishing its priority)

If a lien is enforced by a foreclosure action, the defendant's interest and title in the property subject to the lien can be divested only by a foreclosure sale, and the judgment should order the sale to satisfy all the liens established in their just order of priority and equality.[1] A chattel mortgagee owes a junior mortgagee the duty to see that a sale on foreclosure is conducted fairly and honestly in such a manner that the reasonable value of the chattel will be realized.[2]

> ◆ **Illustration:** Upon confirmation of a foreclosure sale, the court was to determine whether the amount owing to the plaintiff under a security agreement should have been increased by the reasonable expenses of the foreclosure action and counsel fees, whether the defendants should be credited for the reasonable value of any use of the chattels by the plaintiff since the latter obtained possession

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[11]Hovey v. Elliott, 118 N.Y. 124, 23 N.E. 475 (1890).

[Section 101]

[1]§ 100.

[2]Lien Law § 209.

As to the courts, generally, in which such action may be brought, see § 81.

For discussion of execution of judgments, generally, see N.Y. Jur. 2d, Enforcement and Execution of Judgments §§ 1 et seq.

[Section 102]

[1]Am. Jur. 2d, Liens § 94.

[2]Fells v. Globe Candle Co., 253 A.D. 729, 300 N.Y.S. 659 (2d Dep't 1937).

> thereof, whether a deficiency judgment should have been allowed against the defendants in the light of the alleged delay by the plaintiff in proceeding with the foreclosure sale and the possible resultant depreciation of the value of the chattel or because of any other reasons that the defendant properly might assert, and for the amount to be allowed for deficiency judgment or surplus, if either, and who would be entitled thereto.[3]

Where the mortgagee purchases the chattel for an inadequate price at an unfair sale, he or she is accountable to a junior mortgagee for the value of the property at the date of the sale.[4] Additionally, where the amount realized is much less than the value of the chattel, because of collusion between the mortgagor and the mortgagee, such amount will be treated as a voluntary payment on the debt, and the lien of the junior mortgage will remain unimpaired.[5]

§ 103 Deficiency on foreclosure sale; defense

Research References

West's Key Number Digest, Liens ⚷22

Am. Jur. Pleading and Practice Forms, Liens §§ 93 (Affidavit—In support of motion for deficiency judgment after lien foreclosure sale—By attorney for plaintiff), 94, 95 (Judgment or decree—Granting deficiency judgment after lien foreclosure sale)

West's McKinney's Forms, Selected Consolidated Laws, Lien Law § 208 Form 1 (Judgment to Foreclose Security Interest Created by a Security Agreement in Personal Property)

The Lien Law, in providing for judgment of foreclosure and sale of chattel in enforcement of lien, provides that if a defendant, upon whom personal service is made, is liable for the amount of the lien, or for the monetary obligation secured by the security interest, or for any part thereof, the court may award payment accordingly.[1] A personal judgment for any deficiency may be rendered in the action[2] even in some cases,[3] against a subsequent purchaser of the chattel.[4] However, such a judgment presupposes that the court has obtained

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[3]Sidco Distributing Co., Inc. v. Milco Food Corp., 43 A.D.2d 844, 351 N.Y.S.2d 175 (2d Dep't 1974).

[4]Ever-Ready Label Corp. v. Stuyvesant Photo Engraving Corp., 36 N.Y.S.2d 468 (Sup 1942).

[5]Fells v. Globe Candle Co., 253 A.D. 729, 300 N.Y.S. 659 (2d Dep't 1937).

[Section 103]

[1]Lien Law § 208.

Lien Law § 208 does not contain restrictions similar to those governing real property foreclosures limiting deficiency judgments. See, for discussion thereof, N.Y. Jur. 2d, Mortgages and Deeds of Trust §§ 786 to 817.

[2]Cottone v. Spivach, 159 N.Y.S. 241 (Sup 1916).

[3]Singer Sewing Mach. Co. v. Leipzig, 113 N.Y.S. 916 (App. Term 1908).

personal jurisdiction, that a proper cause of action has been alleged, and that a personal judgment has been demanded in the complaint against those defendants who are to be held personally liable.[5] The defendant must be credited with the value of the seized chattels where a judgment of deficiency is sought following a foreclosure where no deficiency judgment was entered because of the invalidity of the sale.[6]

If in an action to foreclose a chattel lien the plaintiff seeks a personal judgment for any deficiency arising upon the foreclosure sale, any defendant against whom such a deficiency judgment is sought may interpose any defense tending to show the absence of any personal obligation on his part to pay the debt secured by the lien.[7]

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[4]Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

To sustain a deficiency judgment against third persons, based upon their receipt of the property and inability to return it, the value of the property must be established. Anderson v. A.H. Sickinger, Inc., 235 A.D. 735, 256 N.Y.S. 228 (2d Dep't 1932).

[5]Singer Sewing Mach. Co. v. Leipzig, 113 N.Y.S. 916 (App. Term 1908).

[6]Sachs Quality Furniture v. Nadborne, 183 Misc. 778, 51 N.Y.S.2d 503 (Mun. Ct. 1943), order aff'd, 183 Misc. 781, 54 N.Y.S.2d 535 (App. Term 1944).

The burden is on the mortgagor to prove the reasonable value of the seized chattels, where the sale was invalid. Sachs Quality Furniture v. Nadborne, 183 Misc. 778, 51 N.Y.S.2d 503 (Mun. Ct. 1943), order aff'd, 183 Misc. 781, 54 N.Y.S.2d 535 (App. Term 1944).

[7]Briggs v. Oliver, 68 N.Y. 336, 1877 WL 11864 (1877).

Hamill v. Gillespie, 48 N.Y. 556, 1872 WL 9837 (1872).

Consumers' Brewing Co. of Brooklyn v. Braun, 147 A.D. 171, 132 N.Y.S. 87 (2d Dep't 1911).

As to defenses in action of foreclosure, generally, see §§ 93 to 96.

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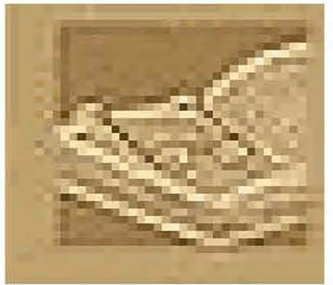

PRINCIPLES OF

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SIXTH EDITION

HERBERT HOVENKAMP
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PRINCIPLES OF PROPERTY LAW

Sixth Edition

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Chapter 2

BAILMENTS

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SUMMARY

§ 2.1 Definition of Bailment

1. Broadly speaking, a bailment is a rightful possession of goods by one who is not the true owner. The goods must be specific and distinguishable. Thus, ordinarily one can not bail fungible items such as cash or grains.

2. Generally, a bailment occurs when there is delivery of personal property by a prior possessor to a subsequent possessor for a particular purpose with an express or implied understanding that when the purpose is completed the property will be returned to the prior possessor.

3. The person who creates the bailment is called the "bailor;" the person to whom the goods are bailed is called the "bailee."

4. A bailment is frequently said to be based on a contract, expressed or implied.

a. Express bailment contracts typically arise as a result of negotiations between the bailor and bailee.

b. Implied contracts can arise when someone comes into possession of the goods of another and the law imposes an obligation upon them to return the goods to another, such as in the case of a finder.

5. The bailee must be in possession of the goods.

6. In order to have possession there must be physical control over the property and intention to exercise that control.

a. Control, for example, is an issue when goods are deposited in a safe deposit box where both the customer and the bank have keys. Some courts hold this a bailment although the bailee has neither complete control nor any way to know what is in the box. The bailee does intend, however, to control the contents whatever they are.

b. There also must be an intent to exercise control. This issue is critical in bailments of parcels or other goods containing items of which the "bailee" is unaware, and in situations where the depository attempts to prevent herself from becoming a bailee of the particular item.

§ 2.2 Distinguishing Bailment From Other Legal Relationships

1. A bailment is distinguished from other legal relationships as follows:

a. *Custody:* When the owner of goods places them in the actual physical control of another with no intent to relinquish the right, as distinct from the power of dominion over them, there is no bailment or possession but only custody. For example, if a clerk hands goods to a customer to examine, the customer has only custody. Similarly, an employee has only custody of his employer's goods.

b. *Sale:* In a sale, title passes to the purchaser; in a bailment the title remains in the bailor.

c. *Conditional Sale:* A purchaser under a conditional sales contract acquires not only possession but also beneficial interest in the goods for which he is under an obligation to pay. The conditional seller retains legal title for security only.

d. *Trust:* A trustee acquires legal title for purposes of performing her duties as trustee; a bailee has only possession. Thus, ordinarily a trustee can convey a good title to a third person whereas a bailee cannot.

e. *Lease:* A landlord-tenant relationship and not a bailment results if there is a lease of space for use by the tenant. The automobile parking lot situation results in a landlord-tenant or licensor-licensee relationship in the case of a park-and-lock operation. In this situation the owner of the car keeps the keys, along with control and constructive possession of the automobile. On the other hand, if the keys are surrendered to the attendant who assumes control of the car, there is a bailment. In a lease of personal property where the lessee

acquires possession of the goods with an obligation to return them, the lessee is a bailee of the goods.

§ 2.3 Classification of Bailments and Standard of Care

1. Although the classifications are criticized, bailments are frequently classified according to which of the parties derives the most benefit. Classification is important for the purpose of imposing liability for negligence on the bailee and assessing the standard of the bailee's care over the bailed goods. According to the classification scheme, if the bailment:

a. Is for the sole benefit of the bailor, the bailee is liable only for gross negligence and is responsible for exercising slight care over the bailed goods;

b. Is for the sole benefit of the bailee, the bailee is liable for even slight negligence and is responsible for exercising great care over the bailed goods;

c. Is for the mutual benefit of both the bailor and bailee, the bailee is liable for ordinary negligence and is responsible for exercising ordinary care over the bailed goods. Ordinary care is that care that would be exercised by a reasonably prudent person under the circumstances. The trend is for this standard in all cases.

2. The parties by contract may alter the standard of care owed by the bailee where this is not contrary to public policy. To so contract, both parties must accept the terms, and where only a sign is posted by the bailee, there must be proof that the bailor saw and accepted its terms. For example, a limitation of liability on a check or receipt for the bailed goods is valid only if the bailor read the ticket and did not object, or if a reasonable person would expect a contract under such circumstances. Some such attempts to limit liability may also be invalid on public policy grounds or by express statute.

§ 2.4 Liability for Failure to Return Goods

1. The bailee has a duty to return the goods to the bailor on demand, or if a fixed term has been set for the bailment by contract, at the expiration of that term.

2. The bailee is liable for conversion, regardless of negligence, if the bailee wrongfully refuses to return the goods or if the bailee delivers the goods to the wrong person. This is often called a "misdelivery."

3. Liability of the bailee is based on negligence if the goods are lost, stolen, destroyed, or damaged during the bailment. The

burden of proof is normally on the bailor to establish that the bailee was negligent, and if the bailor proves delivery of the goods and failure to return them, or re-delivery in a damaged condition, the bailor establishes a prima facie case. At this point, the burden of going forward with the evidence ordinarily shifts to the bailee.

§ 2.5 Rights of Bailees Against Third Parties

A bailee is entitled to possession of the bailed property or damages against third parties who wrongfully take or damage the property. The wrongdoer cannot defeat the bailee's claim by showing title in another with whom the wrongdoer has no connection. Thus, as against the subsequent wrongdoer the bailee's possessory interest in the bailed goods is essentially the equivalent of title.

§ 2.6 Rights of Bailors Against Bona Fide Purchasers

1. Ordinarily a person cannot transfer a greater title to property to a third person than the transferor has. Thus, a bailee ordinarily cannot defeat the rights of the bailor by transferring the bailed property to a third party.

2. Under certain circumstances a bailee can transfer a good title to a purchaser even though the transfer is wrongful as against the bailor. This can occur if the bailee is a dealer of the kind of goods bailed and the transferee is a bona fide purchaser for value.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 2.1 Definition of Bailment

PROBLEM 2.1: A's messenger, C, dropped a bond through a letter slot into B's office. The bond was in an envelope bearing the name of A. B's employee, who had not seen C, immediately discovered that the bond had been incorrectly delivered and was not the one ordered by B. For the purpose of returning the bond to A, B's employee immediately opened the door and called for A's messenger. X, a wrongdoer, stepped up to the door and B's employee, mistakenly believing X to be A's messenger, handed the bond to X. X absconded with the bond. A brought suit against B to recover the value of the bond, and the trial court found in A's favor. B appeals, what result?[1]

Applicable Law: A bailment is a consensual transaction entered into willingly by the bailor and the bailee. The term "involuntary bailment" is applied to those situations where property is placed under the control of a person without that

1. Cowen v. Pressprich, 117 Misc. 663, 192 N.Y.S. 242 (1922), reversed, 202 App.Div. 796, 194 N.Y.S. 926 (1922).

person's knowledge or consent. In this situation the only obligation owed by the "bailee" to the owner is that of ordinary care under the circumstances. Absolute liability in conversion for misdelivery, applicable to bailees generally, is not applicable to involuntary bailees. Thus, if an involuntary bailee acts reasonably in attempting to divest himself of possession as soon as he becomes aware of the chattel, the "bailee" is not liable to the owner if the chattel is thereafter lost, stolen, or damaged without the "bailee's" negligence. This rule applies because in involuntary bailments the bailee does not know the identity of the bailor. A similar rule applies to finders who, although exercising due care, mistakenly return the goods to the wrong person.

Answer and Analysis

B should win the appeal. In a consensual bailment, the bailee intentionally assumes possession of the bailor's chattel and is aware of the responsibilities assumed with respect to the property. Furthermore, the bailee knows the identity of the bailor. Frequently, however, a person comes into possession of a chattel without either the person's knowledge or consent. This is generally the case when a finder finds lost property. While a minority of courts deny the existence of a bailment, the great majority classify the relationship as a quasi or involuntary bailment.

The common law does not thrust the duty of caring for the goods of another on a person against his will. When someone acquires possession of another's goods involuntarily, she has no affirmative duty to care for them unless she does some act inconsistent with the proposition that she does not accept possession. For example, if the person uses the goods for her own purposes, willfully destroys them, or refuses to surrender them to the owner on demand, the person then assumes dominion and possession over them. The person also assumes the liabilities of a bailee.

Here, the bailee was put in possession of the bond without any agreement to accept it. The delivery had been a mistake. The bailee promptly discovered it and immediately attempted to return the bond to the messenger. Therefore, as an involuntary bailee there was only responsibility to exercise ordinary care in attempting to return the bond.

In a voluntary bailment, the bailee is held strictly accountable for a misdelivery and is liable for conversion when a misdelivery occurs. However, this is not the rule as to an involuntary bailee. Rather, the involuntary bailee is liable only for negligence and the sole issue is whether the bailee used means which were reasonable and proper to return the goods. The reason for this is clear. In a

voluntary bailment the bailee knows who the bailor is; in an involuntary bailment this is not likely to be the case. Thus, the bailee should not be held liable for returning the goods to the wrong person when the bailee has exercised reasonable care in attempting to return the goods. In other words, the bailee is held liable only for the bailee's negligent or willful acts.

In the problem there was no showing that the means used to return the bond was improper. Therefore, B should win the appeal.

PROBLEM 2.2: W was a guest in the X Hotel which was frequented by wealthy guests. W left her purse in the hotel dining room. The purse, which contained some cash, credit cards and ten pieces of jewelry valued at over $15,000 was found by a bus boy and then returned to Y who claimed the purse as hers. No testimony was offered to show whether the bus boy demanded any identification from Y to establish her ownership of the purse. W sued the hotel to recover the value of the cash and jewelry. Can W prevail?[2]

Applicable Law: Ordinarily a bailee can be liable as a bailee only for goods of which he has actual knowledge. However, if the bailee assumes possession of one good in which another good might reasonably be contained, the finder-bailee can be held liable if the finder-bailee negligently returns both goods to the wrong person.

Answer and Analysis

A bailment is a consensual transaction. Therefore the bailee can only be liable for goods of which the bailee knowingly takes possession. Thus, if a fur coat is checked in a coat check room and in the sleeve of the coat is a fur piece, the bailee is not liable for the piece hidden in the sleeve if it would be unreasonable to assume the bailee had or should have had knowledge of the hidden fur piece. On the other hand, in certain cases it would be reasonable for a bailee who accepts possession of one good to assume that the bailed good might contain another good. For example, if a car is bailed in a parking lot located in the center of a large tourist area, the bailee could be held liable for the car, if stolen as a result of the bailee's negligence, as well as the contents of suitcases contained in the trunk of the car.[3]

2. Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex.Civ.App.1972).

3. See Insurance Co. of North America v. Solari Parking, Inc., 370 So.2d 503 (La.1979), where the court held that since the bailee parking garage operator agreed to accept the bailors' automobile without reservations concerning its contents, the items contained in the bailors' automobile were included in the damages contemplated by the parties to the contract of deposit. Compare Ampco Auto Parks, Inc. v. Williams, 517 S.W.2d 401 (Tex.Civ.App.1974) (parking lot was not a bailee of the contents of a trunk if

Under the doctrine of *respondeat superior*, the hotel could be liable for the action of its employee returning the purse containing the jewelry to the wrong person even though it has no actual notice that the purse contained the jewelry. The hotel was frequented by wealthy patrons and it would not be unreasonable to assume that a guest might keep her jewelry in a purse awaiting some occasion to wear it or to return it to the hotel safe. While this rationale might not apply if W were merely a local resident who had come to the hotel for dinner, a court might reach the same result on the theory that because a hotel could not readily distinguish patrons who were guests in the hotel from patrons who were not guests in the hotel, it would be reasonable to assume that all patrons were guests.

Of course, in no event would the hotel be liable if its employee was not negligent. This is not a case of a voluntary bailment. Therefore, liability for misdelivery is based on negligence.

§ 2.3 Classification of Bailments and Standard of Care

PROBLEM 2.3: A drove her car into B's enclosed parking lot and paid the parking fee. A also selected the spot in which to park the car. However, A left the car keys in the ignition at the request of the attendant. The attendant gave A a ticket on which the following language was printed:

> *Liability. Management assumes no responsibility of any kind. Charges are for rental of space. From 8 AM to 11 PM. Not responsible for articles left in or on the car. Agree to within terms.*

When A returned, A discovered the car had been stolen. A sues B. May A recover?[4]

Applicable Law: A parking lot operation results in a lease or license of space relationship when the motorist parks and locks the car but results in a bailment when the attendant takes possession and control of the car. The conduct of the parties, not the printed words on the ticket, determines the relationship. The parties by a voluntary agreement may limit the liability of the bailee but ordinarily the bailee cannot exempt itself from all liability for negligence.

Answer and Analysis

A can recover. Depositing an automobile in a parking lot may constitute either a lease or license of space or a bailment of the automobile. The difference is whether the owner of the car trans-

contents could not reasonably be expected to be in the trunk).

4. Malone v. Santora, 135 Conn. 286, 64 A.2d 51 (1949). But see, Allen v. Hyatt Regency–Nashville Hotel, 668 S.W.2d 286 (1984).

fers possession and control of the automobile to the lot owner and the lot owner assumes it. Where the attendant collects a fee and designates the area in which to park, but the owner parks and locks the automobile, there is no transfer of possession. Consequently, there is a lease or license and no bailment and generally no liability on the parking lot for theft.

On the other hand, when the attendant takes possession of the car, parks it, retains the key and issues a receipt, possession passes from the owner of the automobile to the lot owner and a bailment is created regardless of what the ticket says. Once the bailment relationship has been created a duty arises to exercise reasonable care to prevent theft. Here the facts are more ambiguous because A selected the space but left the keys. Nonetheless, on balance it seems that because the keys were left in the car at B's request a bailment was created. The provisions on the receipt are of no effect because, absent a contrary statute, a bailee can not by contract relieve itself from all liability for losses resulting from its own negligence. On the other hand, the bailee could limit its liability to a specific dollar amount.[5]

PROBLEM 2.4: A, a jewelry salesperson, while staying at Hotel, placed a case filled with jewelry in Hotel's safe. A state innkeeper statute provides that if the innkeeper provides a safe it shall not be liable for the loss of a guest's goods unless the guest places them in the safe. Another state statute fixes $500 as the maximum amount beyond which the guest cannot recover unless the innkeeper consents to a greater liability. A did not inform Hotel's clerk that there were jewels in the case. The case was subsequently lost and A sues Hotel to recover the value of the jewelry. What result?[6]

Applicable Law: At common law an innkeeper was an insurer of the safety of the guest and the guest's property and was liable for any losses except those occasioned by an act of God, fraud or negligence of the guest. Statutes limiting the liability of innkeepers are very common today. These statutes frequently provide that the innkeeper shall not be liable for the valuables of its guests if the hotel provides a safe for the deposit of articles and the guest does not take advantage of it. The statutes also frequently provide a limit of liability even if the guest deposits the valuables in the safe. Where applicable, the terms of the statute govern the liability of the innkeeper.

5. See Restatement (Second) of Contracts, § 195 (1979).

6. Chase Rand Corp. v. Pick Hotels Corp. of Youngstown, 167 Ohio St. 299, 147 N.E.2d 849 (1958).

Answer and Analysis

A can only recover $500 from Hotel. Modern statutes generally have modified the "insurer's" liability created by the common law. Under the common law the guest did not have to disclose the value of the property in order to impose liability on the innkeeper, but this rule has changed. The modern statutes require a guest to use reasonable care and prudence in the protection of his property. One aspect of this care is the disclosure of the value of the property to the innkeeper in order to hold the inn liable for the excess of that provided for in the statute. Failure to disclose is an act of negligence that precludes recovery beyond $500.

In this case since A did not disclose the contents of the case, A's recovery is limited to the statutory maximum.

PROBLEM 2.5: B loaned A earthmoving equipment pursuant to a contract providing that A would keep and maintain the equipment in good mechanical condition during the term of the agreement and return it to B "in good mechanical condition, ordinary wear and tear excepted." The equipment was destroyed by fire, without negligence on A's part. The trial court held that A was an insurer under this contract and liable for the loss of the equipment. A appealed. What result?[7]

Applicable Law: Generally, a bailee is not an insurer; rather the bailee is liable only if the bailee was negligent. The parties, however, by a valid contract may agree to expand or limit the liability of the bailee. The liability of an insurer will only be imposed, however, where the contract is explicit in that regard. An agreement to return the bailed property in the same condition as when received does not impose the liability of an insurer.

Answer and Analysis

A wins. A bailee is not an insurer of the property in an ordinary bailment. The weight of authority holds that a bailee is not liable for damage to the bailed property resulting from fire or other casualty if the bailee was not negligent. However, a bailee may extend or qualify its liability by contract unless contrary to public policy. Therefore, a bailee may become an insurer if it explicitly contracts that it will be absolutely liable regardless of fault. The general rule, however, is that a covenant to insure is not implied in a contract. It is imposed only where it is found in the agreement in clear and explicit language. An agreement to return

7. St. Paul Fire & Marine Ins. Co. v. Chas. H. Lilly Co., 48 Wash.2d 528, 295 P.2d 299 (1956).

the bailed property in the same condition as when received does not impose such unusual responsibility.

§ 2.4 Liability for Failure to Return Goods

PROBLEM 2.6: A wished to have B repair a ring while B was staying at the C Hotel. A took the ring off her finger in the presence of the hotel cashier and asked her to deliver it to B. The cashier placed the ring in an envelope, wrote B's name on it, and placed it on her desk. The ring was either lost or stolen without being delivered to B. A sues the C Hotel to recover $2,500, the value of the ring. C Hotel defends by saying there was no bailment because A failed to disclose the unusual value of the ring. May A recover?[8]

Applicable Law: A bailment consists of the rightful possession of another's goods. But possession also requires an intent to control and possess as well as control in fact. The delivery and acceptance of a ring creates a bailment even though the receiver was ignorant of the true value of the ring, so long as the bailee could have ascertained the value.

Answer and Analysis

Yes. A bailment has been broadly defined as the rightful possession of goods by one who is not the owner. Possession consists of physical control of the goods with an intent to exercise that control. Where the goods claimed to be bailed are concealed from the bailee, the bailee will not have intended to assume possession of them, and no bailment exists. Here, there is no question as to the identity of the thing bailed, namely a ring. Rather there is a dispute respecting the value of the bailed goods. Since there was an intent on the part of the bailee to accept possession of the ring, a bailment was created. An erroneous estimate of the value of the ring does not release the bailee from liability or result in a conclusion that no bailment is created if the bailee was not prevented from ascertaining the value upon reasonable inspection.[9]

This rule imposes on the bailee the obligation to ascertain the value of the goods rather than imposing a duty of disclosure on the bailor. The rule is subject to criticism at least in those cases where the bailor has information concerning the value of the bailed goods but does not voluntarily disclose that information to the bailee. The

8. Peet v. Roth Hotel Co., 191 Minn. 151, 253 N.W. 546 (1934).

9. If the value of the ring could not be determined upon reasonable inspection, e.g., the ring once belonged to Martha Washington, then the bailee should not be liable for the value of the ring attributable to its historical significance.

rule also causes bailees to limit their liability by contract to a fixed value unless the bailor discloses a higher value to the bailee.

Once it is concluded that a bailment was created, it is necessary to determine what degree of care was owed by the bailee. Historically, it was customary to distinguish bailments on the basis of who derived the principal benefit from the relationship. If the bailment was for the sole benefit of the bailor, then the bailee owed a duty of slight care and was liable only for gross negligence. If the bailment was for the mutual benefit of the parties (the typical bailment), then the bailee owed a duty of ordinary care and was liable for ordinary negligence. If the bailment was for the sole benefit of the bailee, then the bailee owed a duty of great care and was liable for slight negligence. Here, the bailment was one for the benefit of both parties. The ring was accepted by the hotel in the ordinary course of its business, and, therefore, was as a matter of law for its benefit. The duty of ordinary care and liability for ordinary negligence governs. While the historic common-law classification of bailments could have applied in *Peet*, the court rejected the tripartite structure as obsolete preferring to adopt the rule that the bailee must exercise, in all bailments, that degree of care which an ordinary prudent person would have exercised under the same or similar circumstances. At first blush this may appear to be a significant difference. However, actual results in cases applying this more modern standard may not differ much from the results using the historic common-law standard if one of the circumstances to be considered in assessing the degree of care exercisable is whose benefit the bailment was created for.

In order to recover from the bailee, the bailor generally must prove a lack of ordinary care on the part of the bailee. In the usual case this is impracticable, for the bailor is unaware of why the goods were not returned, or why they were returned in a damaged condition. Consequently, many courts follow the rule that if the bailor proves delivery of the chattel to the bailee and a failure to return it, or a return in a damaged condition, then the bailor has presented a prima facie case for recovery. The burden of going forward with the evidence then shifts to the bailee and it must explain its failure to return the chattel, or rebut the prima facie case by showing it had exercised the degree of care required by law. While the bailee has the burden at that point of going forward with the evidence or risk a directed verdict for the bailor, the majority of courts hold that the bailor always has the burden of proof that the bailee was negligent, and that the presumption of negligence in favor of the bailor disappears once the bailee has introduced evidence to the contrary. However, a minority of courts, including *Peet,* hold that the bailee has the burden of persuading the jury the loss of the chattel was not due to his negligence. In this case A

proved delivery to the hotel, and the hotel was unable to show what happened to the ring, or that it had not been negligent. Therefore, the court should direct a judgment for A at the close of B's case.[10]

PROBLEM 2.7: A had a trunk transported by the B Railroad Corporation on its railroad from Providence to Boston. In Boston it was placed in B's warehouse. It could not be found when A came to claim it. The trial judge ruled that if the trunk had been taken from the depot by mistake, without negligence on the part of B, B would not be liable. A appeals this ruling. What result?[11]

Applicable Law: A bailee has an absolute duty to redeliver the bailed goods to the bailor after the purpose of the bailment is accomplished. If the bailee delivers the bailed goods to the wrong person, the bailee is liable to the true owner for conversion, irrespective of negligence. However, if the goods are stolen from the bailee without negligence or wrongdoing on its part, the bailee is not liable. The bailee's liability is absolute in the case of misdelivery, but otherwise it is responsible only for the exercise of due care.

Answer and Analysis

A loses. The judgment should be affirmed. Once the purposes of the bailment have been concluded, a bailee owes to the bailor the duty of redelivering the subject matter of the bailment on demand. While the bailee's duty during the bailment is that of using reasonable care, it is strictly liable if it returns the goods to the wrong person or an unauthorized third party. The bailee also is liable for a conversion if it refuses to deliver the goods to the bailor on the bailor's demand. However if the property was stolen from the bailee during the term of the bailment, the bailee is not liable to the bailor unless the theft occurred as a result of the bailee's negligence.

§ 2.5 Rights of Bailees Against Third Parties

PROBLEM 2.8: O bailed goods to B. The goods were wrongfully destroyed by W. B sues W to recover the value of the goods. W claims that B cannot recover because O owns the goods. The trial court holds that B cannot recover the value of the goods from W. B appeals. What result?[12]

10. In *Peet* the court held that the burden of proof under the above facts was on the hotel to show non-negligence. See generally, Bailment: Allocation of the Burden of Proving the Bailee's Negligence, 43 Mo.L.Rev. 90 (1978).

11. Lichtenhein v. Boston & Providence R.R. Co., 65 Mass. (11 Cush.) 70 (1853).

12. The Winkfield, [1902] Probate 42 (1901). The court held that where a ship containing mail was injured by another vessel and the Postmaster General claimed the right, as bailee of the senders of the mail, to recover the full value of the lost letters from the wrongdoer vessel, "[t]he wrongdoer, having once paid full damages to the bailee, had an

Applicable Law: The bailee, just as a finder, has good title against all the world but the true owner. As against others, the bailee's prior possessory interest is the equivalent of title. This rule accords with the law's general protection of rights acquired by possession. Thus as against a wrongdoer a bailee has a superior title which cannot be defeated by the wrongdoer showing a better title in a third person from whom the wrongdoer's rights in the property are not derived. This rule applies even if the bailee would not be liable to the bailor for loss of or damage to the goods. If the bailee recovers from the wrongdoer, the bailor cannot recover from the wrongdoer as well.

Answer and Analysis

B should win the appeal. A bailee has a good title against a wrongdoer by reason of the bailee's prior possession of the goods. Thus, the bailor can prevail as against the bailee, as can others who have a relatively better title based upon prior possession or an absolute title. A wrongdoer cannot defend a suit by the bailee by showing someone with a title superior to the bailee unless the wrongdoer can claim derivatively from the person with the prior right. If the rule were otherwise, the law would reward only possession without regard to notions of first in time, first in right and would encourage the wrongful taking of goods from the possession of another.

The right of the bailee to recover from the wrongdoer is not dependent upon the bailee being liable to the bailor for the loss of or damage to the goods.

If the bailee recovers from the wrongdoer, any recovery is payable to the bailor and the bailor cannot recover from the wrongdoer in a later suit. Thus, by paying damages to the bailee the wrongdoer acquires a superior title to the bailor. This rule is justified on the rationale that by entrusting the goods to the bailee the bailor implicitly authorized the bailee to take the necessary steps to protect the goods including recovering damages from a wrongdoer. When the bailee sues and elects to claim damages rather than the goods, the bailee acts for the bailor as an agent and binds the bailor. Thus, even though the bailor, had she sued, might have sued for the return of the goods rather than damages, the bailor is bound by the acts of the bailee.

It can be argued that binding the bailor to the acts of the bailee is inappropriate in the case of involuntary bailments. However, the

answer to any action by the bailor."); see also Berger v. 34th St. Garage, 274 App.Div. 414, 84 N.Y.S.2d 348 (1st Dept. 1948) (suit by a bailee of merchandise on the behalf of the owner-bailor of the merchandise against a negligent third-party stated a cause of action; reiterated the rule set forth in *The Winkfield* that the bailor cannot recover from the wrongdoer in a later suit).

better view, even in this case, is that the bailor should be bound since any other rule would expose the wrongdoer to multiple suits and the potential of paying twice for the same wrong. Nonetheless some courts have held that where the bailor is known the bailee cannot sue for damages or recovery of the goods.[13]

§ 2.6 *Rights of Bailors Against Bona Fide Purchasers*

PROBLEM 2.9: O owned a diamond ring which needed cleaning. O left the ring with B, a local retail jeweler to be cleaned. B cleaned the ring, put it in a case in the front of the store and subsequently sold it to P, an unsuspecting customer who paid B the full value of the ring. B refused to pay O the value of the ring. O then sued P to recover the ring. What result?[14]

Applicable Law: At common law a bailor who entrusted goods to a bailee under such circumstances that a reasonable person could believe that the bailee was the owner of the goods was estopped from claiming the goods from a bona fide purchaser for value. A similar rule applies under Section 2–403 of the Uniform Commercial Code, the so-called entruster provision.

Answer and Analysis

While as a general rule a person cannot convey a better title than he or she has to a third person, under certain circumstances it would be inequitable to hold an innocent purchaser for value liable to another for goods purchased from a wrongdoer when the purchaser had no reason to suspect any wrongdoing and paid full value for the goods. This is particularly true in the case of commercial transactions where the purchaser is dealing with a wrongdoer who deals regularly in the goods that are purchased. The rule prohibiting the owner from recovering from the bona fide purchaser for value thus responds to the tension between the desire to protect titles and the desire to foster the movement of goods in commerce by favoring commercial interests.

If an owner entrusts goods to a person who from all outward appearances appears to be authorized to sell the goods to others, it is inequitable to permit the owner to recover the goods from the

13. Barwick v. Barwick, 33 N.C. 80 (1850) ("it would be manifestly wrong to allow the plaintiff to recover the value of the property; for the real owner may forthwith bring trover against the defendant and force him to pay the value a second time; and the fact that he had paid it in a former suit would be no defense."); Russell v. Hill, 125 N.C. 470, 34 S.E. 640 (1899) (plaintiff who purchased timber from a person who did not have title to the land, did not have an action in trover against a defendant who later converted the timber without right).

14. See, Zendman v. Harry Winston, Inc., 305 N.Y. 180, 111 N.E.2d 871 (1953).

bona fide purchaser. It is inequitable because it is the act of entrusting (an act initiated by the bailor and which the bailor could have avoided) that created the situation which permits the wrong to occur. This position is bolstered by the fact that there is little or nothing the purchaser can generally do to protect him or her self since commercial transactions in goods rely on the fact of possession as the best evidence of title.

The rule is expressed as a rule of estoppel. Thus, an owner is estopped from claiming a superior title as against the bona fide purchaser for value because the owner's acts were largely responsible for the loss and the innocent purchaser was not in a position to protect him or her self.

This theme underlying the common law rule of estoppel is also reflected in Section 2–403 of the Uniform Commercial Code providing that "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business." This buyer is defined as a "person who in good faith and without knowledge that the sale to him is in violation of the ownership rights ... of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind."

In the problem, B appears to be a retail jewelry merchant whom P would rightly assume had title to goods in the jewelry case being offered for sale to the public. O was aware that B was a retail jewelry merchant and by entrusting the ring to B should have appreciated there was always a risk that B would commingle the ring with other stock in trade and offer it to sale to the public. Under either the common law or the UCC, P should win.[15]

Neither estoppel nor the entrusting rule applies to stolen property. Thus, is T steals O's watch and T takes the watch to B for repair, a bona fide purchaser from B would not prevail as against O. P can only acquire whatever title the entrustor had. Here the entrustor is T who has no title.

15. Compare, Porter v. Wertz, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1st Dept. 1979), affirmed 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981) (buyer acted in bad faith in purchase of goods from person who was not a merchant).

EXAMPLES & EXPLANATIONS

Property

Second Edition

Barlow Burke and Joseph Snoe

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4

Bailments

At this point, we turn from a discussion of the means of acquiring possession to one on the methods of transferring the right to possession. Bailment, gift, and sale are the three methods of transferring an object of personal property. This chapter considers bailments. Gifts and sales are introduced in the next two chapters.

Definitions

A ***bailment*** is the transfer and delivery by an owner or prior possessor (the ***bailor***) of possession of personal property to another (the ***bailee***)

(1) whose purpose in holding possession is often for safekeeping or for some other purpose more limited than dealing with the object or chattel as would its owner, and
(2) where the return of the object or chattel in the same, or substantially the same, undamaged condition is contemplated.

This transfer of possession of property for a limited purpose, once accomplished, requires the transferee or bailee to redeliver the property to the transferor or bailor. Put another way, once the purposes of the bailment are accomplished, a failure to redeliver renders the bailee strictly liable. A bailment results in the rightful possession of personal property by a person not its owner.

Bailments affect everyday life. When a person rents a car or parks it in a commercial parking lot, a bailment arises. When you leave your clothes at the cleaner's or your film at the photo shop, a bailment is created. Even borrowing a book from a friend gives rise to a bailment.

Bailments are common in commercial transactions. For banks, pawnbrokers, common carriers, warehouses, and hotels, bailments are at the heart of their businesses. Some commercial bailments, as with warehouses, are treated in detail in the Uniform Commercial Code, Article 7. Thus bailments represent a pervasive form of transfer transaction, arising frequently and in many commercial and noncommercial contexts. Because of this, as we will

see, some judges and commentators have argued that a modern uniform rule is needed for them.

A bailment is the result of a contract or agreement, express or implied, or the conduct of the parties — or some combination of agreement and conduct. Some jurisdictions require an express agreement of some type to create a bailment, but also may imply agreements and bailments from conduct. Identifying a bailment requires, then, that you look not only at the parties' agreement, but also at their conduct — if only as evidence of their implementation of an implied agreement. More generally, then, a bailment may be regarded as the implementation of a contract, as a transfer of property, or as some sui generis hybrid of both contract and property law.

Because the subject of any bailment is personal property, regarding bailments as an area of the law of property takes the most realistic view. Bailments are typically established because of some property interest of the bailor (the owner) in an object.

Bailments typically are limited to tangible personal property, but this term includes pieces of paper representing rights in other things. It is now well settled that securities, bonds, and negotiable instruments may be held in a bailment as well. Whether intellectual property may be held in a bailment is a controversial subject.

The general rules governing bailments are predicated on the absence of a specific agreement that may supersede or vary those rules. In other words, the rules are implied by law in the absence of an agreement to the contrary. In this view, bailments may be founded upon either an express or an implied agreement.

A bailment requires a delivery of possession — without delivery there is no bailment. No particular ceremony is necessary; however, there are three types of delivery. It may be actual, constructive, or symbolic. With an ***actual delivery*** of an object, the object is physically handed over to the bailee. A ***constructive delivery*** occurs when one gives the keys to a safe deposit box or to a heavy or bulky object, such as a bureau or chest of drawers, to the transferee; this transfers control of the object without actually delivering it, and is the gist of a constructive delivery. A ***symbolic delivery*** is the receipt by the bailee of a thing symbolizing the object of the bailment. While this may be something associated with the object, a symbolic delivery usually means transfer by use of a written instrument.

In addition to delivery, a bailment requires the bailee's ***acceptance*** of the delivered property. Like the delivery element, acceptance might not be actual. Constructive acceptance is found when a person comes into possession of an object by mistake or takes possession of it when it is left or lost by its owner.

Without an actual delivery and acceptance, some courts refer generally to the possibility of a constructive bailment without identifying the missing element. A ***constructive bailment*** arises when possession of personal property

is acquired and retained under circumstances in which the recipient should keep it safely and return it to its owner. Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. App. Ct. 1972) (involving a purse left in a hotel dining room and found by a hotel employee). In *Caranas*, there was no intentional delivery of the purse, but the court found that a constructive bailment arose because the hotel patron would expect that, if found, the misplaced purse would be retained and kept safe for her eventual return. Thus, where there is evidence that the bailee received and accepted the object, but not that the bailor intended to deliver it, a constructive bailment arises for purposes of allocating the loss or damage to the object upon its misdelivery.

Overview of Negligence and Strict Liability

Some of the following material discusses when a bailee is strictly liable and when it is liable only for negligence. Since you may be reading this early in the semester, a quick introduction to negligence and strict liability may be helpful. ***Strict liability***, as you may have guessed, means an actor is liable for damages, notwithstanding any actions he took or failed to take. ***Negligence***, on the other hand, demands the actor be at fault. The elements for negligence depend on the state, but to oversimplify, there must be a standard of care, and the defendant's action or inaction must fall short of the applicable standard of care. If the actor's conduct falls below the applicable standard of care, the actor is negligent.

For the defendant to be liable for his negligence, however, the negligence must be the actual cause of a plaintiff's injuries. In addition, the defendant's negligence must be the proximate or legal cause of the plaintiff's injury. The proximate or legal cause considerations are legal matters including whether the defendant had a duty to the plaintiff not to act in a negligent manner, and whether the legal system believes a defendant should be liable in circumstances of the case. Finally, the plaintiff must suffer actual damages. An actor's "standard of care" varies based on the circumstances and is often a factual determination by a jury as to how a "reasonable person" should act under the circumstances. As this brief discussion indicates, it is easier for a plaintiff to win a strict liability case than it is to win a negligence case.

Specialized Bailment Issues

(a) Pledges

Some bailments have more specialized uses. A ***pledge*** is a bailment to secure a debt or obligation of the bailor. It is a bailment for security. The transfer of

possession need not be made to the pledgee (the creditor or obligee). Instead, it can be to a third party.

(b) Park-and-Lock Cases

One tricky area of bailments is distinguishing a bailment from a lease or license. Identifying a transaction as a bailment — instead of a lease, say — is an important step for the alleged bailor because of the duty placed on the bailee to redeliver the chattel. A failure to redeliver raises a presumption that the bailee negligently handled the chattel in her care.

Take, for example, a parking lot that requires that you pull a ticket to lift a gate at entry, choose the space in which to park, and lock your car so that it cannot be moved by the management. If parking the car in the lot constitutes a bailment, the parking lot operator becomes a bailee, and with it comes the responsibility to care for the car. If the lot operator merely gives the car owner a license to use space to park his car, no bailment results and the car remains under the owner's control. If the space is leased for a definite period of time, the car remains under the control of the car owner, and no bailment exists.

Such a park-and-lock arrangement would have at one time created no bailment. Control over the car, coupled perhaps with an exculpatory clause on the ticket, negated the delivery requirement for a bailment. A license to use the parking space was instead created, or if you paid a fee at entry, perhaps a lease was found. Today a park-and-lock arrangement in some jurisdictions creates a bailment. See Allen v. Hyatt Regency–Nashville Hotel, 668 S.W.2d 286 (Tenn. 1984) (holding that a bailment was created when a car owner parked and locked his car in an indoor multistory garage operated in conjunction with a hotel).

Peeling away the facts in *Allen* shows the difficulties with these cases. What if the lot were outdoors (in a setting in which the operator has less control over the parking spaces)? What if it were not associated with a hotel? The owner of an open park-and-lock lot, in which each space has a separate meter, is an unlikely bailee. Rhodes v. Pioneer Parking Lot, Inc., 501 S.W.2d 569 (Tenn. 1973). A license or a lease is a more likely characterization of the arrangement in such a parking lot.

The New Jersey Supreme Court has ruled that the traditional elements of a bailment are inadequate for the enclosed park-and-lock lot cases and has found that a parking lot owner has a duty of reasonable care under all the circumstances of a case and that when the parked car is damaged upon its owner's return, there is a presumption of negligence by the owner of an enclosed lot because (1) the owner is in the best position to absorb and spread the risk of damage; (2) the car owner's expectation is that he will reclaim the car in the condition he left it; and (3) were it otherwise, the owner's proof of negligence while he was away "imposes a difficult, if not

insurmountable, burden" on him. McGlynn v. Parking Authority of City of Newark, 432 A.2d 99 (N.J. 1981).

Even when a bailment is recognized in a transaction, identifying the subject of the bailment may provide further problems. In a jurisdiction in which park-and-lock parking creates a bailment, the bailee will be liable for any vandalism that damages the exterior of the parked car, but might still argue that no bailment was created as to valuables found in — and stolen from — its glove compartment. The ground for this argument is that valuables might be expected to be found in, say, a safe deposit box in a bank, but not in the glove compartment of a car. There are exceptions, however. The operator of a parking garage in a well-known tourist location, such as the French Quarter of New Orleans, may be held to know that tourists carry valuables in the trunks of their cars.

(c) Safe Deposit Boxes

The same preliminary issues occur when a person rents a safe deposit box at a bank: Is the renting of the box a bailment, license, or lease? Despite the use of the word "rent" in transaction, courts usually find a bailment has occurred. The box remains under the bank's control.

Misdelivery of Bailed Property

(a) Strict Liability and Negligence

The relationship between bailor and bailee gives rise to a standard of care and liability for the misdelivery or misredelivery of the object. Causes of action involving bailments are styled in the complaints in either contract or tort. For misdelivery of the bailed object, the bailee is strictly liable in tort, absent a special agreement or a statute. A bailee strictly liable is liable even if the bailee is not at fault for the misdelivery. An important example of a statute absolving a bailee from strict liability for misdelivery is found in the Uniform Commercial Code sections applicable to warehouse operators. U.C.C. § 7-404 (imposing no duty if reasonable commercial standards are used by warehouseman). Otherwise, the bailee is strictly liable for a misdelivery of the chattel. In some states, a rule of strict liability has been replaced by a presumption of negligence — i.e., by a rule that says that unless the bailee can account for the loss of the bailed item in some nonnegligent way, a presumption arises that its loss was the result of the bailee's negligence.

(b) Burden of Proof

The burden of proof in a negligence case of misdelivery is on the bailee — who is generally the defendant in such cases — to show that he did not act

in a negligent manner. The counterargument is that the presumption asks the bailee to prove a negative — that he was not negligent — and that this is a very difficult task.

This burden of proof is assigned to the bailee for five reasons. First, the bailee knows the history of the bailment best. Second, the bailee has the right to sue thieves and converters of the chattel. Third, the bailee is in the best position to take steps to secure (the recovery of) the chattel. Fourth, the risk of damage or misdelivery is best borne by the bailee, since it can spread the risk in its charges to its customers. Fifth, and finally, the assignment serves to prevent the bailee from engaging in fraudulent misdeliveries or other acts. Many of these justifications also justify the imposition of strict liability on the bailee. To some extent, then, the assignment of this burden to the bailee serves as a stand-in or surrogate for strict liability.

Even if the bailee shows that it took reasonable care, a failure to take steps to secure the recovery of the chattel would render it liable, unless it shows that the steps would have been futile.

If a bailee deviates from the terms of the bailment, it will have to show that the deviation makes no difference to the loss or damage. Examples arise when the bailee takes a different route than as instructed, or when the bailee entrusts the goods to a third party without authority, or where the chattel is stored elsewhere than as authorized. The deviating bailee in effect becomes the insurer of the goods and strict liability follows, unless it can show that the deviation was harmless.

(c) *What Must Be Redelivered*

Generally it is obvious what property must be returned to the bailor. The issue in some cases, however, is what must be delivered back to the bailor. Consider the following four examples:

First, a deposit of money in a bank. Here the same bills are not expected back, so no bailment arises; rather, a debtor-creditor relationship arises between the bank and its depositor.

Second, the deposit of grain into a silo or a grain elevator for its operator to hold for delivery to a railroad. Here the depositor expects that a similar quality of grain will be given over or back, but not the exact grains deposited. If the issue of whether a bailment is created arises in the course of a bankruptcy or insolvency of the silo operator, the answer determines whether the bailor stands in the secured or the unsecured line of creditors. Thus, the purpose of the bailment sometimes determines its presence or absence.

Third, a herd of cattle is put in the care of a farmer. Only if all the animals perished in the hands of the transferee would a court find this to be a bailment. The herd can be expected to suffer attrition if it is mostly bulls, but not so if it is mostly cows. Some courts might hold that the herd as a

whole is the subject of a bailment, but that there is no bailment of the individual animals in it.

Fourth, consider seed delivered to a farmer by a merchant. There is no bailment when the merchant expects a mature crop in return. If bailor and bailee expect a change in the basic nature of the chattel, there is no bailment.

When Bailed Property Is Lost or Damaged

The bailee is liable not only for misdeliveries, but also if the bailed goods are lost or damaged. Strict liability does not apply in lost or damaged property cases. The bailee is liable only in negligence.

The ***standard of care*** traditionally required of the bailee varies with the degree of reward or benefit the bailee receives. A three-pronged rule is used, as follows:

(1) When the benefit of the bailment to the bailee is slight, the care required of the bailee is slight; the bailee is liable only for ***gross negligence.*** This is typically a ***gratuitous bailment*** such as a person taking care of an object for a friend or neighbor, or one created by a mistake. Ordinarily, a finder is such a bailee. See Waugh v. University of Haw., 621 P.2d 95, 968 (Haw. 1980) (stating this).

(2) If the bailment benefits both bailor and bailee mutually and is equally beneficial to both, the standard of care imposed on the bailee rises and the bailee is liable for negligence and has a duty of reasonable care under the circumstances. Leaving an item in a packet with the desk clerk of a hotel was found in one case to be a bailment benefitting both the bailor (the guest) and the bailee (the hotel). Peet v. Roth Hotel Co., 253 N.W. 546 (Minn. 1934); Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. App. Ct. 1972) (involving a purse left in a hotel dining room and found by a busboy). In *Caranas*, for example, leaving the purse unattended on the floor might not create a bailment, but the subsequent assumption of its possession by an employee does — and its subsequent disappearance from the hostess's desk will make the hotel liable for a misdelivery.

(3) Finally, if the bailment benefits the bailee, as with a borrowed object, the bailee's standard of care rises again and the merest neglect or any damage renders the bailee liable. This higher standard of care also applies to certain commercial bailees such as transport companies and repair shops.

This three-pronged standard was first developed in an early American legal treatise by Joseph Story in his *Commentaries on the Law of Bailments.* It was well received at its inception because it offered the American bar a refined view of older contract-based English and American cases and also incorporated into those older cases then-emerging theories of negligence.

Story believed that the duty imposed on a gratuitous bailee could not be the same as that imposed when a consideration was paid. The gratuitous bailee was only liable because of actual performance by the bailee and subsequent reliance by the bailor — in other words, a type of detriment consideration established the bailment.

Story's views have not gone unchallenged. Many courts take a contractual view of bailments because they regard Story's approach as too mechanical. Others think that the focus on the rewards inherent in a bailment excludes an examination of the propriety of the parties' conduct. Still others see this skewed focus, but also perceive a need for one modern general rule that fits ubiquitously all types of bailments; they think that Story's incorporation of negligence law into bailment law did not go far enough. Thus, some courts have abandoned this three-pronged standard of care. They have done so either expressly or with opinions that tend to combine or blur Story's several standards. These courts adopt, expressly or in fact, a rule of reasonable care under the circumstances (including as a circumstance the degree of benefit received by the bailee), making a bailee's liability dependent on the exercise of such reasonable care. This reasonable-care rule juxtaposes the risk and the bailee's conduct; the relationship between the risk and the conduct determines how much care is reasonable under the circumstances.

Nevertheless, Story's three-pronged standard remains the traditional and widely used method of analysis for a bailment where the issue is the standard of care to be applied.

EXAMPLES

Honor Among Thieves

1. Armas steals a valuable wristwatch from its true owner and then takes it to Burrell's shop for repairs. Clayton sees the watch on Burrell's shop counter and takes it. Can Burrell replevy the watch from Clayton?

Parking Lot Tribulation

2. During the early evening hours, Darrell parks his car in an attended parking lot. He gives the keys to the attendant, who asks him how long it will be before Darrell returns. Darrell says that he will return at midnight, two hours after the lot closes. The attendant moves the car into a space visible from the booth and Darrell pays the parking fee for the hours up to closing. The attendant says that at closing he will put the keys to Darrell's car under the floor mat. Darrell nods to the effect that he has heard the attendant, but when he returns at midnight, his car has vanished. Darrell sues the parking lot owner for conversion of the vehicle. In this suit, what result and why?

High-Priced Free Parking

3. Florence went shopping. On the way, she stopped at a drive-through sandwich shop. After paying for her food, Florence put her wallet on the passenger seat. Florence parked her car at Barney's Clothes, Inc., which maintains a free parking lot for its customers. An attendant tends the lot. At the request of the parking lot attendant, Florence left her keys with him. When Florence left her car to go shopping, she inadvertently left the wallet on the car seat.

When trying to pay for a new outfit, Florence missed her wallet and immediately returned to her car. Neither she, the attendant, nor the police could find Florence's wallet. The wallet contained $350. Florence sues Barney's Clothes for the value of the wallet but mainly for the $350. Who prevails?

Borne Away Bearer Bonds

4. A messenger employed by Stock & Co., a corporate securities brokerage firm, is instructed to deliver some bearer or demand bonds of Harmony Company to Bond Brothers, Inc., another securities firm. The messenger is given the bearer bonds of Harman, Inc., instead of those for Harmony Company. He carries the Harman bonds to Bond Brothers. He enters the Bond Brothers' office, approaches the receiving teller's window, rings the bell, deposits the bonds in a secure box to the side of the window, turns away, and returns to Stock & Co. An employee of Bond Brothers quickly notices the mistake, calls "Stock" through the window, and is approached by a man who says, "Yes, stock." The employee hands the Harman bonds to the man, who takes them and vanishes. Has a bailment for the bonds been created at Bond Brothers' office?

Organ Solo

5. The biotechnology industry is in part founded on the use of other people's body parts. Is a bailment created when a diseased organ is removed surgically from a patient by a doctor and later used in research that produces valuable medicine?

Are My Pictures Back?

6. Is a photography laboratory that accepts undeveloped film for processing into prints or slides a bailee of the film? Is this a bailment where the same thing, or a different chattel, is expected back? If there is a bailment, is the lab liable for the value of the film or the value of the prints? Can the fine print on the box of film or the receipt for the film exculpate or limit the liability of the lab?

EXPLANATIONS

Honor Among Thieves

1. Yes. The issue is whether the bailee of a thief acquires the right to sue third-party wrongdoers. The orderly conduct of bailments requires that although the thief has no possessory right to transfer, Clayton should not be able to set up a weakness in the transfer from Armas to Burrell as a defense. That would be deciding the suit on a the basis of Clayton's jus tertii defense — rarely a good idea.

Parking Lot Tribulation

2. The transfer of the keys, as well as the moving of the car by the attendant to a space selected by the attendant, suggests that there is a bailment. Assuming the attendant was acting within the scope of his employment, the crucial question is whether there was a constructive redelivery of the car. Because the action of the attendant made possible the theft, the rule of strict liability or the presumption of negligence should apply. See System Auto Parks & Garages v. Am. Economy Ins. Co., 411 N.E.2d 163 (Ind. App. Ct. 1980).

High-Priced Free Parking

3. This Example derives from Swarth v. Barney's Clothes, Inc., 242 N.Y.S.2d 922 (1963). Barney's Clothes wins. Barney's was bailee of the automobile under the facts, but it does not necessarily follow that Barney's was bailee of the wallet. The elements of the bailment are actual physical control with intent to possess — i.e., delivery and acceptance. Assuming the wallet was "delivered," there was no acceptance or intent to possess. A wallet is not usually possessed by the operator of the parking lot, and the attendant had no notice of the wallet. No bailment of the wallet; thus no liability under the bailment rules.

Borne Away Bearer Bonds

4. These are the facts of Cowen v. Pressprich 192 N.Y.S. 242 (N.Y. Sup. Ct. App. Term), rev., 194 N.Y.S. 926 (1922). The intermediate appeals court first held that a bailment was created. It was at first an involuntary or gratuitous one, to which only the slightest duty attached. When the Bond Brothers employee picked up the Harman bonds, however, it became a voluntary one, and a duty of reasonable care attached. Not having seen the messenger from Stock & Co., the Bond Brothers employee should have required identification, sent the bonds back using its own employees, or called Stock & Co. to check the identity of the messenger. Instead, the court

said, when Bond Brothers undertook to redeliver the bonds, it took the risk of misdelivery upon itself, and so should pay damages for its conversion of the bonds. The intermediate appeals court opinion in *Cowen* was issued over a strong dissent.

On further appeal, the state's highest appellate court adopted the lower court dissenter's analysis based on the fact that Bond Brothers took possession by mistake, and promptly noticed and honestly tried to remedy the mistake, without any intent to interfere with the plaintiff's ownership of the bonds and by an action consistent with the plaintiff's ownership. The highest appellate court concluded that Bond Brothers never accepted delivery and hence did not take on the responsibilities of a bailee. Because no bailment was created in Bond Brothers, Bond Brothers was not strictly liable for misdelivery of the Harmon bonds.

Organ Solo

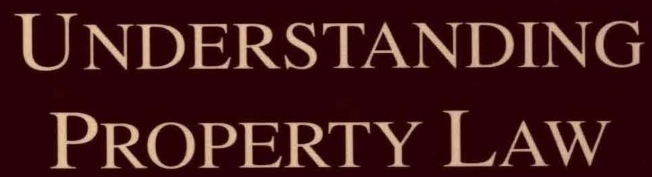
5. Several issues arise. Many are discussed in Moore v. Board of Regents of the University of California, 793 P.2d 479 (Cal. 1990) (finding a breach of fiduciary duty and no patient consent, but not conversion). The first is whether a human organ can be the object of a bailment by the donor. Many courts and statutes frown on treating the human body as an object to be bought and sold in commerce. Many states refuse to recognize the organ as personal property; hence the bailment rules would not apply.

If the bailment rules do apply, the issue turns on whether the patient intended to give the organ to the surgeon for any purpose or for a limited purpose of destroying it according to law, whether the patient abandoned or released all interest in the organ, or whether the patient retained a property interest in the organ. Since there is no evidence that the patient intended to deliver the organ to the surgeon for research purposes, if the state permits a bailment in this situation, a finding of bailment — or at least constructive bailment — and conversion seems appropriate.

Are My Pictures Back?

6. The laboratory is a bailee. In the end, it does not matter. The photos to be returned can be traced to the original film, which distinguishes this case from one of fungible goods. The lab is liable for the price of the film. This may be a case where the lab can limit its liability. Some courts may not allow a bailee to limit its liability for its own negligence, however. This Explanation also assumes the laboratory has no reason to know of any "special circumstances" about this film's importance. See Carr v. Hoosier Photo Labs, 441 N.E.2d 450 (Ind. 1982) (holding, first, that it was a bailment to return the film, though in a new form; second, that the photographer accepted the terms of the exculpatory provision on both the box of film and the receipt

for the film given by the lab; and third, that the provision was neither unconscionable nor void). *Carr* involved an experienced amateur photographer, also an attorney with a business law practice, who took a European trip and brought back 18 rolls of exposed film for processing to a major film manufacturer's lab. Four of the rolls were lost and never accounted for. The photographer won a $13.60 judgment for the value of the film, but lost a lower court's award of $1000 for the value of his prints to him.



UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

Chapter 7

OTHER PERSONAL PROPERTY RULES

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§ 7.01 Accession

[A] Basic Rule

When one person uses labor or materials to improve a chattel owned by another, the doctrine of accession determines who receives title to the resulting product.[1] The original owner of the chattel almost always retains title where the improver acted in bad faith (e.g., stole the chattel). Under some circumstances, however, the accession doctrine may vest title in the good faith improver. If title is awarded to the improver, he or she is obligated to compensate the original owner for the value of the chattel in unimproved condition.

Accession illustrates the strong influence of Lockean labor theory on American property law. Locke posited that each person owns his own body, and thus his own labor; if one mixes his labor with raw materials found in a "state of nature" to produce a new item, it is owned by the laborer (*see* § 2.03[A]). It was simple for common law courts to extend this principle to the analogous situation where the improver mistakenly believes that he or she owns the raw materials. As between the industrious improver and the idle owner, accession assigns title to the improver, thereby rewarding and encouraging productive labor.

[B] Addition of Labor Only

One branch of the doctrine involves adding *only labor* to a chattel owned by another. Suppose that S uses O's clay to create a valuable sculpture, mistakenly believing that O agreed to this use. Who owns the sculpture? As a general rule, one who in good faith applies labor to another's property acquires title to the resulting product if this process either (1) transforms the original item into a fundamentally different article (e.g., seeds planted to produce a crop)[2] or (2) greatly increases the value of the original item (e.g., timber made into barrel staves).[3] Under this doctrine, S owns the sculpture; O is entitled to damages equal to the fair market value of the original clay.[4]

[C] Addition of Labor and Materials

The other branch of accession involves adding *both labor and materials* to another's chattel. When materials owned by two different owners are combined together in good faith, the owner of the "principal" materials

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[1] *See generally* Richard A. Epstein, *Possession as the Root of Title*, 31 Ga. L. Rev. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

[2] *But see* Bank of Am. v. J & S Auto Repairs, 694 P.2d 246, 249 (Ariz. 1985).

[3] *Compare* Wetherbee v. Green, 22 Mich. 310 (1871) (when standing trees worth $25 were converted into barrel hoops worth about $700, the innocent trespasser owned the hoops), *with* Isle Royale Mining Co. v. Hertin, 37 Mich. 332 (1877) (when standing trees worth about $1 per cord were converted into firewood worth $2.87 per cord, no accession occurred).

[4] B.A. Ballou & Co. v. Citytrust, 591 A.2d 126 (Conn. 1991).

acquires title to the final product. For example, suppose M innocently installs a custom truck body on a bare truck frame owned by O. If M's materials add more value to the finished truck than O's frame, M owns the truck; O receives only the fair market value of the frame.[5]

§ 7.02 Adverse Possession of Personal Property

[A] Traditional Approach

Title to personal property can be acquired through adverse possession.[6] Most courts apply the adverse possession standards for real property (*see* Chapter 27) to chattels as well, either directly or by analogy. Thus, under the traditional view, one whose possession of a chattel is *actual, adverse, hostile, exclusive, open and notorious,* and *continuous* for the appropriate statute of limitations period obtains title to it, subject to the qualifications discussed below. The limitations period for recovery of a chattel (usually 2-6 years) is shorter than the parallel period for real property (usually 5-20 years). In most states, the limitations period begins running when the adverse possessor obtains possession of the chattel.[7]

[B] Critique of Traditional Approach

Application of the real property adverse possession standards to chattels is troublesome. Suppose that for six years X possesses a valuable antique vase owned by Z; X displays the vase prominently in his living room during this period. Is this conduct sufficiently "open and notorious"? If the elements of adverse possession are intended to give adequate notice to the true owner of the chattel so as to start the statute of limitations running, one might argue that X's acts are insufficient because Z is unlikely to receive notice.[8]

Under the traditional approach, however, X has probably acquired title to the vase. After all, X has used the vase in the same manner that any normal owner would. What more could X do? The difficulty here stems from the fundamental difference between real and personal property. Because real property is immobile, its ordinary use by an adverse possessor may provide notice to the true owner; the law presumes that owners periodically inspect their lands. Yet because a chattel is portable, the adverse possessor's ordinary use will normally not put the true owner on notice.

[5] Eusco, Inc. v. Huddleston, 835 S.W.2d 576 (Tenn. 1992); *see also* Ballard v. Wetzel, 1997 Tenn. App. LEXIS 699 (defendant gained title to Corvette through accession).

[6] *See generally* J.B. Ames, *The Disseisin of Chattels*, 3 Harv. L. Rev. 23 (1889); Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 Buff. L. Rev. 119 (1989); R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 Nw. U. L. Rev. 1221 (1986).

[7] *See generally* Henderson v. First Nat'l Bank, 494 S.W.2d 452 (Ark. 1973) (successful adverse possession of stock).

[8] *Cf.* O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980).

[C] Emerging Approaches

[1] Discovery Approach

A small group of states has responded to the inadequacy of the traditional standard by adopting a "discovery" approach, particularly where the chattel has artistic, historic, or other special importance. In these states, the statute of limitations begins running only when the true owner actually knows (or reasonably should know) that the adverse possessor holds the item. Thus, as a practical matter, the limitations period does not commence unless the conduct of the adverse possessor is obvious enough to place a diligent owner on notice.

The New Jersey Supreme Court's decision in *O'Keeffe v. Snyder*[9] illustrates the discovery approach.[10] Three pictures painted and owned by plaintiff Georgia O'Keeffe disappeared from an art gallery in 1946; O'Keeffe learned in 1976 that defendant Snyder had acquired the paintings and brought a replevin action against him. Snyder claimed ownership by adverse possession, asserting that the applicable six-year limitations period had expired in 1952. Observing that the traditional adverse possession standard may not be sufficient to put the original owner on actual or constructive notice when art or other chattels are merely displayed in a private home, the court adopted the discovery rule in its stead. Thus, "if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run."[11]

The discovery approach imposes a significant burden on the adverse possessor. For example, in order to commence the limitations period for recovery of a painting, the adverse possessor might be required to maintain the painting on public display in a museum or to publish periodic newspaper advertisements seeking the true owner. Ironically, the good faith adverse possessor who is unaware of any competing claimant will be unlikely to take these steps and thus will not acquire title. Yet the bad faith adverse possessor who knowingly complies with the law will obtain title from the negligent owner.

[2] "Demand and Refusal" Approach

The "demand and refusal" approach adopted by New York affords owners even greater shelter than the discovery approach. Under this view, the limitations period for a replevin action against the good faith purchaser of a stolen chattel does not commence until the purchaser receives and refuses the owner's demand to turn over possession of the item.[12]

[9] 416 A.2d 862 (N.J. 1980); *see also* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990) (following *O'Keeffe* approach).

[10] The case is analyzed in Paula A. Franzese, *"Georgia on My Mind"—Reflections on* O'Keeffe v. Snyder, 9 Seton Hall L. Rev. 1 (1989).

[11] O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980).

[12] Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991).

§ 7.03 Bailments

[A] Bailments in Context

Broadly defined, a bailment is the rightful possession of chattels by someone other than the owner.[13] Bailments are ubiquitous in everyday life. For example, bailments are created when: A borrows B's book; A leases B's trailer; B stores her furniture in A's warehouse; and A finds B's lost watch. In each instance, A is a *bailee* (the person holding possession of the item) and B is a *bailor* (the owner of the item). The bailee is obligated to care for the item, and ultimately to redeliver it to the bailor.

The law governing bailments is extraordinarily complex. Over the last century, a property-based approach to bailments has slowly eclipsed the traditional contract approach. Certainly, many bailments stem from contract (e.g., A leases a car from Avis). The resulting impetus to explain bailments in contract terms was understandable; and decisions in some states still recite the necessity for an express or implied contract before a bailment may be found. Yet two types of bailments do not fit neatly into the contract model: many gratuitous bailments arise from agreement, but do not involve consideration; and involuntary bailments are imposed by law, in the absence of agreement. The property approach is broad enough to encompass all bailment categories. Yet the influence of the contract model lingers in some jurisdictions.

[B] Creation

[1] Possession of Chattel

Under the property-based approach, a bailment arises when the bailee has rightful possession of a chattel owned by another person. Possession means (1) physical control over the chattel and (2) the intent to exercise that control. For example, suppose O obtains a safe deposit box at B Bank; both O and B Bank have a separate key to the box, and both keys are required to open the box. These facts create a bailment because B Bank, as bailee, exercises control over the vault in which the safety deposit box is located. O, the bailor, cannot obtain access to her box without B Bank's consent.

[2] "Park and Lock" Arrangements

One of the most intriguing bailment issues concerns the status of cars parked pursuant to "park and lock" arrangements. Assume O drives his car into the entrance to L's parking lot, takes a ticket from L's machine that causes the barrier gate to raise, parks and locks the car, and retains

[13] Scholarship on bailments includes R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. Kan. L. Rev. 97 (1992); Kurt P. Autor, Note, *Bailment Liability: Toward a Reasonable Standard of Care*, 61 S. Cal. L. Rev. 2117 (1988).

his keys. Exit from the lot is controlled by L's employee, a cashier in a booth; L's security employees patrol the lot periodically. O returns to find that his car has been stolen. Can O now sue L for breach of the bailee's duty of care?

Cases are almost evenly split on the point. A bailment was found in the leading case of *Allen v. Hyatt Regency-Nashville Hotel*.[14] There the Tennessee Supreme Court emphasized that the car owner had utilized an indoor commercial garage located in a hotel. In addition to the hotel employee who monitored the exit, hotel security personnel patrolled the area regularly. The court concluded that these facts created the requisite control for a bailment to exist, even though the car owner retained his keys and chose his own parking space.

Ellish v. Airport Parking Company of America, Inc.[15] illustrates the opposing viewpoint. The New York appellate court explained that the airport parking lot at issue was designed to provide temporary storage space for cars in an urban area, quite unlike the "traditional warehouses of the professional bailee with their stress on security and safekeeping."[16] It observed that the plaintiff retained as much control as possible over the car; she chose her own parking space, retained her keys, and did not expect the defendant to move the car during her absence. Further, plaintiff was warned when she entered the lot that it was not attended. The court reasoned that she had no expectation that the defendant would take special precautions on her behalf. Thus, the relationship was one of license, not bailment.

[C] Duties of Bailee

[1] Basic Standard of Care

The legal principles defining the bailee's duty of care are in transition. During the nineteenth century, most states adopted a rather intricate approach developed by Supreme Court Justice Joseph Story, under which the bailee's duty of care varied according to the type of bailment involved.[17] If the bailment was solely for the benefit of the bailor (e.g., when a finder finds a lost article), the bailee was liable only for gross negligence. If the bailment was for the mutual benefit of bailor and bailee (e.g., when a customer test drives a dealer's car), the bailee was held to the ordinary negligence standard. Finally, if the bailment was solely for the benefit of the bailee (e.g., when a neighbor borrows a lawn mower), the bailee was liable for damage caused by even slight negligence.

Today almost all states[18] have replaced this elaborate system with the

[14] 668 S.W.2d 286 (Tenn. 1984).

[15] 345 N.Y.S.2d 650 (App. Div. 1973).

[16] *Id.* at 653.

[17] Peet v. Roth Hotel Co., 253 N.W. 546 (Minn. 1934).

[18] *But see* First American Bank v. District of Columbia, 583 A.2d 993 (D.C. Ct. App. 1990) (district's impoundment of illegally-parked car was for mutual benefit of district and car owner, so district was required to exercise ordinary care).

ordinary negligence standard.[19] Regardless of the category of bailment involved, this modern view requires a bailee to exercise the same degree of care that a reasonable person would exercise under the circumstances.[20] For example, in *Peet v. Roth Hotel Co.*,[21] a hotel was held liable for the value of a ring that was lost after the plaintiff bailor entrusted it to the hotel's cashier for delivery to a hotel guest.[22] As is typical in bailment disputes, the plaintiff was unaware of the circumstances surrounding how the hotel lost the ring, and thus unable to prove negligence. The Minnesota Supreme Court followed the modern solution to this proverbial dilemma; it ruled that plaintiff established a prima facie case by proving only that the bailment existed and the ring was not returned to him. This shifted to the hotel the burden of providing evidence that the ring was lost without any negligence on its part, a burden it could not meet.[23]

[2] Misdelivery

In contrast, the bailee who delivers the item to the wrong person is usually held strictly liable, on the theory that this constitutes conversion. If O leaves his rare book behind in R's restaurant where it is later destroyed by flooding, R will be liable only if the damage was caused by R's own negligence. But if R, in complete good faith and after exercising all due care, instead delivers the book to T (a third party who has no legal right to it), then R is strictly liable. Most commentators agree that this distinction makes little sense.[24] The bailee's liability should be governed by a uniform standard, not by a standard that varies according to the type of event that causes the loss.[25]

[3] Exculpatory Contracts

Bailees often attempt to exculpate themselves from future negligence by contract, using a variety of methods (e.g., language on claim check or sign on wall). In general, American courts will not enforce a provision that limits the bailee's liability if the bailor is not actually aware of the provision. Even where the bailor is so aware, many courts refuse to uphold such provisions

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[19] For criticism of the traditional approach, see Kurt P. Autor, Note, *Bailment Liability: Toward a Standard of Reasonable Care*, 61 S. Cal. L. Rev. 2117 (1988).

[20] *See generally* R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. Kan. L. Rev. 97 (1992).

[21] 253 N.W. 546 (Minn. 1934).

[22] *See also* Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. Civ. App. 1972) (hotel liable when its cashier delivered lost purse to wrong person).

[23] *See also* Buena Vista Loan & Sav. Bank v. Bickerstaff, 174 S.E.2d 219 (Ga. Ct. App. 1970) (applying common law rule); Singer Co. v. Stott & Davis Motor Express, Inc., 436 N.Y.S.2d 508 (App. Div. 1981) (applying parallel rule in Uniform Commercial Code § 7-204 to dispute between merchants).

[24] *See, e.g.*, R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. Kan. L. Rev. 97 (1992).

[25] Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. App. 1972) (adopting negligence standard for bailee's misdelivery of restaurant customer's mislaid purse).

on public policy grounds, especially where there is a disparity of bargaining power between the parties.[26]

§ 7.04 Bona Fide Purchasers

[A] General Rule

Suppose T steals 20 bags of wheat from O, and then sells them to B, who pays fair value and believes in good faith that T owns the wheat. As between O and B, who owns the wheat? As a general rule, a seller of personal property cannot pass on better title than he or she possesses, even to a bona fide purchaser. Thus, O still owns the wheat. Because T's mere possession of the wheat gave him no rights to it, he could not transfer title to B. This common law principle is codified in Uniform Commercial Code § 2-403(1): "A purchaser of goods acquires all title which his transferor had or had power to transfer."[27] This approach places a heavy burden on the buyer to investigate the validity of the seller's title, and presumably serves the policy goal of deterring theft. In theory, as the difficulty of selling stolen goods increases, the rate of theft should decline.

[B] Exceptions

[1] Overview

Common law courts recognized that strict adherence to the rule would greatly impair legitimate commerce. Suppose O recovers his wheat and seeks to sell it to M. O may be unable to prove his ownership to M's satisfaction; during the era when the rule evolved (and still today, in most instances), there were no public records that identified the owner of a particular chattel. In addition, from the perspective of law and economics, even if O's ownership could be proven, the transaction costs might be high. Prospective buyers like M might be reluctant to purchase O's wheat for either reason.

As a result, courts developed several exceptions that protect the title of a bona fide purchaser of personal property under limited circumstances. In order to qualify as a bona fide purchaser, a buyer must both (1) pay valuable consideration and (2) believe in good faith that the seller holds valid title. The same principles are incorporated into the Uniform Commercial Code, which protects the good faith purchaser for value in specific situations.

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[26] *But see* Carr v. Hoosier Photo Supplies, Inc., 441 N.E.2d 450 (Ind. 1982) (enforcing clause in bailment contract for film processing where photographer was experienced attorney and thus had equal bargaining power).

[27] U.C.C. § 2–403(1).

[2] Entrustment of Goods to Merchant

One exception involves the owner who entrusts goods to a merchant.[28] Suppose that O breaks her diamond bracelet, and brings it to J, a jeweler, for repair; J then sells the bracelet to B, a bona fide purchaser. B now owns the bracelet. Under the Uniform Commercial Code, one who entrusts possession of goods to a merchant who deals in goods of that kind gives the merchant power to transfer title to a bona fide purchaser in the ordinary course of business.[29] The common law rule is substantially the same.

The conventional rationale for this doctrine is estoppel. By placing her bracelet in the hands of J, a merchant who regularly sells jewelry, O impliedly represents to the world that J is authorized to sell it. In other words, by her conduct O is estopped to deny J's authority when the rights of a bona fide purchaser are involved.

[3] Goods Obtained by Fraud

Another exception concerns goods that a buyer procures from an owner by fraud. The buyer's title to the goods is not void, but merely voidable if and when the owner successfully litigates the issue. Until then, the buyer can transfer valid title to a good faith purchaser for value.[30] Suppose O sells his ancient Roman statue to F in exchange for a painting that F fraudulently claims was painted by Picasso; F then sells the statue to B. If B is a bona fide purchaser, she now owns the statue. As between the wholly innocent bona fide purchaser, on the one hand, and the original owner who could have prevented harm by exercising due care, on the other, justice imposes the loss on the more culpable party, the original owner.

[4] Money and Negotiable Instruments

Finally, the bona fide purchaser of money or negotiable instruments (including checks, promissory notes, and the like) prevails over the original owner.[31] For example, if T steals a $1,000 bill from O's safe, and gives it to bona fide purchaser B in exchange for a used car, B owns the bill. The reason for this exception is apparent: commerce would be paralyzed if the recipient of money or other forms of payment bore the burden of investigating the payor's title.

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[28] U.C.C. § 2–403(2).

[29] *See* U.C.C. § 1-201(b)(9) (defining "buyer in ordinary course of business").

[30] U.C.C. § 2–403(1); *see also* Midway Auto Sales, Inc. v. Clarkson, 29 S.W.3d 788 (Ark. Ct. App. 2000) (where A used fraudulent check to purchase car, he held voidable title); Kotis v. Nowlin Jewelry, Inc., 844 S.W.2d 920 (Tex. App. 1992) (where B used forged check to buy watch, he held voidable title).

[31] U.C.C. § 3–305 (protecting "holder in due course"); U.C.C. § 3-302 (defining "holder in due course").

§ 7.05 Property Rights in Body Parts

[A] The Controversy

A wishes to sell her kidney to B. C and D, a married couple in the middle of divorce proceedings, dispute "custody" of a frozen embryo. Both situations raise the same question: can property rights exist in human bodies or body parts?

The United States seemingly answered this question with a firm "no" when the Thirteenth Amendment[32] abolished slavery for moral, philosophical, and religious reasons.[33] In the post-Civil War era, one human being could no longer own another. The same rationale logically suggested that one person could not own *part* of another, but the issue rarely surfaced. To the contrary, human blood and hair—once removed from the body—were routinely treated as property and regularly sold. While the law did not allow people to sell themselves into slavery, it did permit them to sell certain replenishable body parts.

In recent decades, extraordinary advances in medical technology have reopened the issue. When organ transplants became feasible, for example, the need for human organs skyrocketed. Similarly, the development of in vitro fertilization and other reproductive technologies designed to help infertile couples have created a growing demand for human genetic materials (eggs and sperm) and embryos. The use of body parts for these purposes raises complex questions that our legal system has only begun to address.

Two principal issues arise: (1) who has decision-making authority over the human body and body parts? and (2) to what extent can government restrict this authority? Property law may help to answer these questions, either directly or by analogy.

[B] Rights in Body Parts Generally

[1] The Role of Property Law

The law generally acknowledges the authority of all persons to control the destiny of their body parts. Replenishable body parts such as blood, bone marrow, and hair present the clearest illustration of this principle.[34] For example, A may cut her hair and then (a) transfer it (e.g., as a token given to a loved one), (b) use it (e.g., in making a wig), or (c) exclude others from its possession (e.g., by keeping it in a drawer).

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[32] U.S. Const. amend. XIII, § 1.

[33] Before the Thirteenth Amendment, the American legal system protected property rights in slaves. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1857) (observing that the "right of property in a slave is distinctly and expressly affirmed in the Constitution"); The Antelope, 23 U.S. 66 (1825); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

[34] *See, e.g.*, United States v. Garber, 607 F.2d 92, 97 (5th Cir. 1979) (noting that blood plasma, "like any salable part of the human body," is tangible property).

The same principle applies, though with somewhat less force, to nonreplenishable body parts. Suppose B has two kidneys, while his brother C needs a kidney transplant to survive. The law would allow B to donate one kidney to C, and indeed society would applaud this decision. It saves C's life, while allowing B's own life to continue unimpaired. B thus has the authority to decide the future of his kidney; he can transfer it to C, or continue to use it himself and exclude others from its use. Yet B's decision-making authority is limited by law. Presumably B could not donate both of his kidneys to C, because this would be the equivalent of suicide. Moreover, while B may unquestionably donate one kidney to C or anyone else,[35] B may not sell his kidney for transplantation. The National Organ Transplant Act prohibits the sale in interstate commerce of any human organ "for use in human transplantation."[36] There is, however, a flourishing international market in body organs.

How should we characterize the respective rights of A and B in the examples above? From the perspective of property law, their rights closely resemble those in the traditional "bundle of sticks," including the rights to transfer, use, and exclude.[37] Yet many courts have proven reluctant to adopt a pure property law approach to the area.

[2] *Moore v. Regents of the University of California*

[a] The Issue

The most prominent decision in the area—*Moore v. Regents of the University of California*[38] —involved extreme facts. While treating plaintiff Moore for leukemia, physicians at the UCLA Medical Center discovered that some of his white blood cells ("T-lymphocytes") possessed an unusual quality: they overproduced certain proteins ("lymphokines") that regulate the body's immune system. This quality would make it easier for researchers to identify the genetic material that produced a particular lymphokine; large quantities of that lymphokine could then be manufactured and used to help in the treatment of disease. Moore's cells were not genetically unique; rather, this overproduction was apparently caused by his leukemia. In short, Moore's cells had potential commercial value; but no one informed Moore of this.

Removal of Moore's spleen was necessary to save his life. Moore consented to the operation, but was unaware that the physicians had retained his

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[35] The Uniform Anatomical Gift Act, which authorizes the gift of body organs, has been adopted in all fifty states.

[36] 42 U.S.C. § 274e.

[37] *See* Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002) (where coroner removed corneas from bodies of deceased children for transplantation, parents had property right in children's bodies sufficient to challenge removal).

[38] 793 P.2d 479 (Cal. 1990). For case notes on *Moore*, see Laura M. Ivey, Comment, Moore v. Regents of the Univ. of California: *Insufficient Protection of Patients' Rights in the Biotechnological Market*, 25 Ga. L. Rev. 489 (1991), and Stephen A. Mortinger, Comment, *Spleen for Sale:* Moore v. Regents of the Univ. of California *and the Right to Sell Parts of Your Body*, 51 Ohio St. L.J. 499 (1990).

spleen (and other bodily fluids and tissues extracted during follow-up visits) for research purposes. Eventually, the physicians were able to use Moore's cells as raw material to produce a "cell line" (a "culture capable of reproducing indefinitely"); they received a patent on the cell line.[39]

Moore sued the Regents (as owners of the Medical Center), the physicians, and others for damages on various causes of action, including conversion. To sustain a cause of action in conversion, a plaintiff must show wrongful interference with ownership or possession of personal property. Defendants demurred to Moore's complaint, asserting that he could not meet this standard as a matter of law. Moore, on the other hand, insisted that he continued to own the cells after they were removed from his body. The case ultimately reached the California Supreme Court.

[b] The Decision

The majority held that Moore retained no ownership interest in the cells after removal, and thus could not sue on a conversion theory.[40] Interestingly, the court seemed to assume that Moore had decision-making control over his cells before removal, consistent with the general principle that a person has broad autonomy over his body. While sometimes seeming to follow a property rights analysis, however, the court was unwilling to characterize the removed cells as Moore's property, for two main reasons.[41]

First, it concluded that a California statute governing the disposition of human body parts following scientific use drastically preempted the patient's control over removed cells. "[T]he statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law."[42] The implication here is that Moore effectively "owned" his cells before they were removed, when his rights were eliminated by a specialized statute.

Second, striking a utilitarian theme, the court reasoned that recognizing conversion liability would harm society by discouraging vital medical research. Fearing strict liability for conversion—regardless of good faith—scientists and biotechnology companies would be reluctant to conduct such research because "clear title" to human cells could never be established. The key to understanding the majority opinion is the unusual context in

[39] *See also* Diamond v. Chakrabarty, 447 U.S. 303 (1980) (holding that living, human-made micro-organism may be patented).

[40] *See also* Greenberg v. Miami Children's Hospital Research Institute, Inc., 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (where Canavan disease patients provided tissue and blood to scientists only for purpose of research regarding gene that caused disease, and same scientists later secured a patent on the relevant gene sequence, court dismissed patients' conversion claim but not their unjust enrichment claim).

[41] Even if Moore owned the cells, the majority asserted, he did not own the patented cell line; the cell line was a distinctly new type of property—the product of creative effort applied to fungible raw materials. This conclusion is consistent with the common law doctrine of accession. *See* § 7.01 (discussing accession).

[42] Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 492 (Cal. 1990).

which the case arises: the surgical removal of body parts ultimately used for medical research.

The decision sparked a mixture of concurring and dissenting opinions. For example, one concurring justice raised moral objections to any sale of the "sacred" human body. Adopting a formalistic "bundle of rights" analogy, a dissenting justice argued that Moore at least retained one property right despite the statute: the *"right to do with his own tissue whatever the defendants did with it."*[43]

[c] Reflections on *Moore*

Moore provoked a firestorm of critical legal commentary, more directed toward the rationale than the result.[44] If Moore owned his cells before the removal, which the majority seems to assume, it is not clear how he lost ownership. More to the point, how did the defendants *obtain* ownership? It is tempting to dismiss the opinion as counterintuitive: Moore cannot own his cells, but the defendants can own them? Why?

Much of the difficulty stems from the court's reluctance to concede that property rights can exist in human cells. Certainly, once the cells were removed from Moore's body, they were a type of property for some purposes. If a thief had stolen the cells from the Medical Center, he could have been sued in conversion by the Regents and also prosecuted for larceny; and if the Center had burned down, presumably the fire insurance policy would have covered the value of the destroyed cells.

On the other hand, if the cells were deemed property, then the majority must explain why Moore lost ownership. Some observers question the court's interpretation that the statute eliminated *all* of Moore's rights. The statute on its face is merely a health measure, intended to protect the public from disease caused by the improper disposal of human tissue, not a statute intended to abridge property rights. Moreover, the statute only restricts the disposal of such tissue "following conclusion of scientific use." It does not purport to restrict the use or transferability of human tissue *before* or *during* scientific use. Thus, as the dissenting justice points out, Moore logically retained at least one stick in the metaphorical bundle: control of the future scientific use of his cells.

Why didn't Moore lose his rights by abandoning the cells? This finding was unavailable to the court due to the procedural posture of the case. The case arose on demurrer, where all facts pleaded in the complaint are presumed to be true. Moore (unsurprisingly) did not plead facts establishing abandonment.

The court might have reached its result by a different route. It could have agreed that Moore owned the cells, but held that his property rights did not include the right to sell them or otherwise profit from their commercial

[43] *Id.* at 510 (Mosk, J., dissenting).

[44] *See, e.g.*, E. Richard Gold, Body Parts: Property Rights and the Ownership of Human Biological Materials (1996); Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts, in* Property Rights (Ellen F. Paul et al., eds. 1994).

use. Just as body organs cannot be sold for transplantation purposes, many other forms of property are "market-inalienable." They can be given away, but for reasons of public policy, they cannot be sold.[45]

[3] Should Human Organs Be Sold?

The demand for human organs in the United States far outstrips the supply. Thousands of patients who desperately need kidney transplants, for example, will not receive them due to a chronic shortage of available kidneys. Many law and economics scholars argue that the federal ban on the interstate sale of organs should be lifted. They assert that a free market serves as an efficient system for allocating all scarce resources. From this perspective, the shortage of organs is easily explained: potential providers have no incentive to supply organs because they cannot receive payment. Allowing the sale of human organs would solve this problem. Suppose A wishes to sell her extra kidney to B, who will die without an immediate transplant. Permitting the proposed A-B sale maximizes the utility of each; B lives and A receives payment. Under this view, a free market in human organs maximizes overall social utility.

The sale of human organs is extraordinarily controversial, raising some of the same concerns that surround legal constraints on abortion and prostitution.[46] Personhood theory would object to organ sales as incompatible with human dignity. The same reasons that supported the abolition of slavery suggest that the human body—and therefore body organs—cannot be treated as mere property. Under this view, the state should intervene to protect A and other potential sellers, even over their objection. Conversely, sales of body organs would be consistent with libertarian theory: if A and B, as competent adults, voluntarily agree to a kidney sale, the state should not restrict their autonomy. Even as all persons have the fundamental right to control their own bodies, this approach holds that all persons have complete decision-making authority over parts of their bodies, without any need for the societal paternalism inherent in the current ban.

Some utilitarian theorists suggest that the social cost of organ sales may outweigh any benefit. Under the current regime, organs are available for transplantation at no cost. Permitting organ sales would tend to increase the overall cost of medical care. Moreover, a market approach would exacerbate the division between rich and poor. Today the patient's wealth is largely irrelevant in the allocation of available organs. But under a market approach, organs would tend to go to the rich, not to the poor. For the same reason, the poor would be more likely suppliers of organs than the rich, presenting concerns of human exploitation.

A final concern is the social burden caused by unregulated organ sales. Suppose A sells not only her kidney, but—in a future era of transplantation

[45] Margaret J. Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987); *see also* Donna M. Gitter, *Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in Their Biological Material*, 61 Wash. & Lee L. Rev. 257 (2004).

[46] *See* Henry B. Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. Health Pol. Pol'y & L. 57 (1989).

technology—also sells her corneas, arms, legs, and other nonrenewable body parts. If A is blind, immobile, and incompetent, society will presumably bear the cost of her lifetime care. In this sense, organ sales pose the same social dangers that justify regulation of drug use, gambling, and other self-destructive activities.

[C] Rights in Human Eggs, Sperm, and Embryos

[1] Genetic Material as Property

The issue of rights in human eggs, sperm, and embryos is particularly complex because such genetic materials have the potential to create a human being. Of course, the likelihood that any particular egg, sperm, or even embryo will successfully develop into a living person is extremely slim. Commentators have advanced three alternative legal approaches to genetic material: (a) treating it as "property," (b) treating it as "life," and (c) according it a middle status of special respect.[47]

Genetic materials are effectively treated as property for most routine purposes, although the property label is infrequently used. Because human beings "own" their bodies, the argument goes, they similarly "own" whatever their bodies produce.[48] Thus, for example, the law permits men to sell their sperm, and allows women to sell their eggs. The legal status of embryos also illustrates the point. Suppose that W and H, a married but infertile couple, contract with an in vitro fertilization clinic to help them produce a child. The clinic will require them to execute advance instructions governing the status of future embryos. Utilizing eggs from W and sperm from H, the clinic creates embryos which are frozen and stored for later implantation in W's uterus. W and H now have decision-making control over the embryos, at least as far as the clinic is concerned, and are thus treated as co-owners. In disputes arising between "parents," on the one hand, and third parties such as clinics or storage facilities, on the other, property law principles provide a tool for resolving disputes.[49]

[2] A Right to Destroy Embryos?

The most challenging legal and ethical issues involve the destruction of embryos. The property law model applies with lesser force in this context.

[47] *See, e.g.*, John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 Va. L. Rev. 437 (1990).

[48] *See, e.g.*, Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (holding that man who stored sperm in sperm bank for future use had "an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction"); *but see* Hecht v. Superior Court, 59 Cal. Rptr. 2d 222, 226 (Ct. App. 1996) (refusing, in same case, to implement agreement among potential beneficiaries of decedent's estate re how decedent's sperm should be allocated, on basis that it is a "unique form of 'property'" that cannot be divided in a manner inconsistent with decedent's intent).

[49] *See, e.g.*, York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (holding that agreement between embryo storage facility and biological parents that recognized parents' property interest in embryos should be treated as a bailment, such that the facility was required to release the embryos to the parents upon their request).

Suppose W and H—due to divorce, death, or financial difficulties—instruct the storage facility to discard (and thus destroy) the embryos. Acknowledging the decision-making authority of W and H as progenitors, most courts would enforce this directive.[50]

Suppose W and H begin divorce proceedings and disagree about the fate of the embryos. What happens? In *Davis v. Davis*,[51] for example, W sought "custody" of the embryos in order to donate them to an infertile couple; but H, anxious to avoid the financial and psychological burdens of fatherhood, argued that they should be destroyed. The Tennessee Supreme Court concluded that the embryos were neither "persons" or "property," but rather occupied an "interim category that entitles them to special respect because of their potential for human life."[52] Yet the court then proceeded to analyze the rights of W and H in property-like terms. It recognized that both W and H had "an interest in the nature of ownership" in that they had joint decision-making authority over the embryos.[53] Because W and H disagreed, the court reasoned that the outcome hinged on balancing their respective interests for and against procreation. Under this standard, H's interest in avoiding procreation prevailed, in part because W still had the opportunity to achieve parenthood through a future in vitro fertilization procedure.[54]

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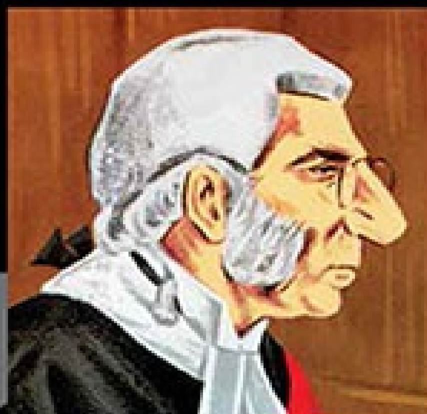
[50] *Cf.* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (noting that a joint agreement regarding destruction of embryos would be enforceable as between H and W); *In re* Marriage of Litowitz, 48 P.3d 261 (Wash. 2002) (enforcing agreement between H and W that embryos would be destroyed if not implanted within five years).

[51] 842 S.W.2d 588 (Tenn. 1992).

[52] *Id.* at 597.

[53] *Id.*

[54] *See generally* Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes through the Adversarial Process*, 33 Fla. St. U. L. Rev. 395 (2005).



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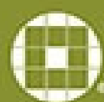

Wolters Kluwer

BAILMENTS

A. Bailments: A bailment is the rightful possession of goods by one who is not their owner.

B. Duty during custody: During the time that the bailee (the person holding the goods) has the object in his possession, he is not an insurer of it. He is liable only for lack of care, but the precise standard depends on who is benefitted:

1. Mutual benefit: If the bailment is beneficial to both parties, the bailee must use ordinary diligence to protect the bailed object from damage or loss.

Example: A hotel which takes guests' possessions and keeps them in its safe is liable for lack of ordinary care, such as where it fails to use reasonable anti-theft measures.

2. Sole benefit of bailor: If the benefit is solely for the bailor's benefit, the bailee is liable only for gross negligence.

3. Sole benefit of bailee: If the bailment is solely for the benefit of the bailee (i.e., the bailor lends the object to the bailee for the latter's use), the bailee is required to use extraordinary care in protecting the goods from loss or damage (but he is still not an insurer, and is liable only if some degree of fault is shown).

4. Contractual limitation: The modern trend is that the parties may change these rules by contractual provisions. But even by contract, the bailee generally may not relieve himself from liability for gross negligence.

a. Acceptance: Also, for such a provision to be binding, the bailor must know of it and “accept” it.

Example: P puts his car into a commercial garage run by D. The claim check asserts that D has no liability for negligence. The provision will be binding only if D can prove that P knew of and accepted this provision — D probably cannot make this showing, since P can argue that he regarded the claim check as merely a receipt.

BAILMENTS CONTINUED

A. What constitutes a bailment: A bailment can be defined as the rightful possession of goods by one who is not their owner. The bailee (the person holding the goods), by virtue of his possession, owes a duty of care to the bailor (the owner). This duty, which varies depending on the circumstances.

B. Creation of bailment: Some cases state that a bailment only arises where the parties make a valid contract for it to exist. However, most courts agree that no formal contract is actually necessary; for instance, consideration is not a requirement. Nonetheless, there are two requirements which must be met before a bailment arises: (1) the bailee must have actual physical control over the object; and (2) he must intend to assume custody and control over it.

1. Physical control: The bailee must come into actual physical control of the bailed property.

a. Parking lot cases: The issue of actual control arises frequently in parking lot cases. If the parking is done by the parking-lot attendant, and the car owner turns over the key, actual control will almost always be found. But in a "park-and-lock" lot, where the car owner parks himself and keeps his own key, most courts have found that the lot never obtains actual control of the car.

i. Presence of attendants: But even in the park-and-lock case, if the lot provides substantial attendant presence, and makes implied or express assurances that security will be maintained, the court may conclude that control has passed to the lot.

C. Rights and duties of bailee: The precise duties owed by the bailee depend upon a number of factors, including who is benefitted by the bailment, how the damage to the bailed property arises, and the presence of any contractual limitations.

1. Duty during custody: During the time that the bailee has the object in his possession, he is not an insurer of it. He is liable for loss or damage occurring to the object only if he is shown to have exercised some lack of care. The precise degree of carelessness which will be required before the bailee is liable, however, traditionally has turned upon who is benefitted by the bailment.

a. Mutual benefit: If the bailment is mutually beneficial to both parties, the bailee must use ordinary diligence to protect the bailed object from damage or loss.

i. What is "mutual benefit": There is usually not much question about whether the bailment is for the bailor's benefit. As to the benefit to the bailee, such benefit of course exists when the bailee makes a charge for the bailment itself. But even beyond this, courts have been quick to find benefit to the bailee if the bailment is done as part of other services being rendered to the bailor, for which the bailor is paying (e.g., a hotel that stores jewelry for hotel guests).

b. Sole benefit of bailor: If the benefit is found to be solely for the bailor's benefit, the bailee is generally held to be liable only for gross negligence.

c. Sole benefit of bailee: Conversely, if the bailment is solely for the benefit of the bailee (i.e., the bailor lends the object to the bailee for the latter's use), the bailee is required to use extraordinary care in protecting the goods from loss or damage. (But even in this situation, the bailee is not an insurer, and some degree of fault must be shown before he will be liable.)

2. Contractual limitations on liability: Bailees, particularly those operating in a commercial context, frequently attempt to modify their duty of care, or the extent of their liability, by contractual provision.

a. Modification of duty of care: Many courts have refused to allow a bailee to contract to exempt himself from liability for his own negligence. But other courts, and the Restatement 2d of Contracts § 195, allow such agreements as long as they do not relieve the bailee from liability for "gross negligence" or "willful and wanton" carelessness.

b. Limitation of liability: Virtually all courts allow the parties to place a contractual limit on the extent of the bailee's financial liability if he does violate the relevant standard of care. However the limitation must be reasonable under the circumstances, and, again, it must not protect the bailee from liability for his willful or gross negligence.

c. What constitutes a contract: Both modification of the standard of care and limitation of liability can only be accomplished by a contract, which of course requires the mutual assent of bailor and bailee. This means that the bailee cannot accomplish either of these goals merely by posting a sign limiting his liability; he must show that the bailor saw and accepted the terms of the sign.

i. Ticket or claim check: Frequently, the bailee prints terms limiting his liability on the claim check, receipt or ticket which is given to the bailor. If the bailee can show that the bailor either was, or reasonably should have been, aware of the terms on the document, the printed terms will be binding. However, it is generally difficult for the bailee to show actual knowledge on the bailor's part, and most American courts have held that one in the bailor's position might reasonably have regarded the document as a mere token for identification purposes, not as a contract. In that event, the terms are not binding, and usual principles of liability apply.