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Forrest W. Lacey

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Perhaps the most important development in this area was the adoption of the Uniform Commercial Code, but as that legislation is to be the subject of other articles in this Review, this year's survey will be confined to decided cases.

I. Mechanics' Liens

Two of the cases involve mechanics' lien problems. One of these, *Hammer-Johnson Supply, Inc. v. Curtis*,[1] presented a new aspect of the recurring question of the duty of a supplier of materials to apply payments from a known source to the debt incurred for that source.[2] In this case a supplier of goods sold materials to a contractor for two different houses and kept the accounts separate. The contractor received payment for job number one. Two days later he paid the supplier 4,131 dollars and directed that 3,300 dollars of the amount be applied to job number two. When the realtor who sold the house built as job number one learned that the contractor had not applied the money received for that job to payment of the material used in that house, he protested, and as a result the contractor directed the supplier to apply the full amount of 4,131 dollar check to job one. The supplier did so, removing the 3,300 dollar credit from the number two account. Later the supplier filed suit to enforce his mechanic's lien on job number two. The owner of this house, who also had paid the contractor in full, claimed that he should be entitled to the 3,300 dollar credit which had been made to and then removed from his account. The chancellor's decision that the owner was not entitled to the credit was affirmed.

In the opinion it is assumed, as the chancellor found, that the source of the disputed payment was a loan to the purchasers of house number one. With this question resolved, the court relied on

* Professor of Law, University of Tennessee College of Law.

1. 364 S.W.2d 496 (Tenn. App. E.S. 1962).
2. See Note, 24 Tenn. L. Rev. 901 (1957).

Tennessee Code Annotated section 64-1140 [hereinafter cited as the Code] which requires contractors to apply payments for improving real property to pay for labor and materials used in the improvement. The court stated that: "Under this statute as well as upon equitable principles Frye [the contractor] received and held the proceeds of the loan in trust for the benefit of the loan company and the owners . . . ."[3]

The court also relied upon an earlier case, *Bain-Nicodemus, Inc. v. Bethay*.[4] In that case, after noting that generally a credit is to be applied against a matured debt and that third parties have no right to compel a different application, the court said:

> An exception to the foregoing rule may be found when a contractor owes the material man two accounts, makes payment to the material man with funds paid to such contractor and the material man has notice of the source of such fund, it is the duty of the material man to give the credit so as to discharge or diminish the obligation chargeable against its source.[5]

In the instant case this principle was held to be controlling.

> It is true the creditor in that case had knowledge of the source of the fund when the payment was credited to the wrong account, while in this case such knowledge did not come to the creditor's attention until after the credit had been made. This, however, is a distinction without a difference upon the rights of the parties. Defendants were not aware that the credit had been made to the contractor's account on their job and, at least, in the absence of such knowledge, we are unable to see how they were in any way prejudiced by the action of the furnisher in making the proper credit as soon as it learned the source of the funds used by the contractor.[6]

Weaver v. Ogle[7] was summarily distinguished as a case where: "It was held that having once properly credited the payment it could not later be transferred to some other account. Here the initial credit was improper and the final credit proper—just the reversal of the situation dealt with in the Weaver case."[8] This distinction is factually correct. However, in the *Weaver* case the rule was stated that payment made to a subcontractor with money which he knows came from a certain source should be applied to the debt of the source "*unless it was understood that it might be applied elsewhere . . . .*"[9] (Emphasis added.) The italicized language suggests that the materialman and the contractor could agree upon application of the payment to another debt even if the materialman knew the source of the payment.[10] The

3. 364 S.W.2d at 498.
4. 40 Tenn. App. 487, 292 S.W.2d 234 (W.S. 1953).
5. *Id.* at 501, 292 S.W.2d at 241.
6. 364 S.W.2d 496, at 498.
7. 2 Tenn. App. 563 (E.S. 1926).
8. 364 S.W.2d at 498-99.
9. 2 Tenn. App. at 576.
10. 24 TENN. L. REV. 901, 904 (1957).

instant case does not speak to this suggestion, because the materialman agreed to the contractor's direction to withdraw the credit given.

The above quoted portion of the opinion in the *Curtis* case to the effect that the contractor held the payment in trust for the owners might indicate that the owners would be protected in any event. But the opinion concedes that there is a split of authority on whether such a trust can be enforced against a creditor who receives trust funds in payment of a personal indebtedness of the trustee, and states that that question is not involved in this case.[11]

Stronger language to support a contention that the supplier *must* apply the money to the account of the known source is found in the court's statement that in the *Bethay* case it was held that where the supplier knew of the source "it was in equity and good conscience bound to apply the credit to the contractor's account"[12] which was the source of the payment. But since it is not squarely presented, the question whether the contractor and supplier may agree to an application of funds prejudicial to the source of the funds remains unsettled in Tennessee.

One further point deserves comment. Earlier Tennessee decisions contained strong statements to the effect that once a credit was given, it could not be changed to the detriment of a third party.[13] The instant case is a clear holding that that may be done, at least where the change is to correct what in the absence of agreement would be the wrong application and where the change is made before the one deprived of the credit is aware that it had been given to him.

The second mechanics' lien case[14] presented the narrow question of whether a road leading to a residence was an "improvement" within the meaning of the Tennessee mechanics' and materialmen's lien statutes.[15] In sustaining a lower court decision to the effect that a road was not an "improvement" the Tennessee Supreme Court relied upon the statutory language and legislative history.

Prior to 1932 two cases interpreting the mechanics' lien statute had limited the meaning of "improvements" to "erections, structures, fixtures, machinery and buildings."[16] The first[17] held that furnishing and planting of flowers and shrubbery and the grading of walks was not an improvement for which a lien could be obtained. The latter of

11. 364 S.W.2d at 498.
12. *Ibid.*
13. See cases cited in Weaver v. Ogle, 2 Tenn. App 563 (E.S. 1926).
14. Britt v. McClendon, 373 S.W.2d 457 (Tenn. 1963).
15. TENN. CODE ANN. §§ 64-1101 to -1143 (1956).
16. Pillow v. Kelly, 155 Tenn. 597, 296 S.W. 11 (1927); Nanz v. Cumberland Gap Park Co., 103 Tenn. 299, 307, 52 S.W. 999, 1001 (1899).
17. *Ibid.*

the cases[18] denied a mechanics' lien for drilling a well and installing piping and a pump. The court stated that:

> The lien is not given for improvements or material unless the improvement bears some relation to a structure or a building, or is appurtenant to a structure or building . . . . Without thus limiting the breadth of the Act . . . it might be extended to . . . the construction of roads and walks . . . and various other projects not appurtenant to any building or structure.[19]

In 1932 the mechanics' lien statute was revised, and the present definition of improvement was adopted. It is set out in Code section 64-1101 as follows: "'Improvement' means any building, structure, erection, alteration, demolition, excavation, or any part thereof, including ornamental shrubbery, on real property for its permanent benefit." In the instant case the court said:

> This definition of "improvement" was adopted by the Legislature in the light of the Pillow and Nanz decisions, and still restricts the "improvement" as used in our mechanics' lien law to those things which bear some relation to a structure or building or which are appurtenant to a structure or building on the land, except in the case of ornamental shrubbery, which is expressly provided for. . . . Had it been the intention of the Legislature to extend the mechanics' lien law to cover roads and walks, these items would have been specifically mentioned as was ornamental shrubbery.[20]

II. Assets Available to Creditors

In re Jennings[21] presented the question of whether the proceeds from a medical payment clause of a liability insurance policy are free from the claim of creditors. The deceased was injured while a passenger in an automobile. Before his death he incurred hospital expenses in excess of thirty-six-hundred dollars, none of which was paid. The driver's insurance policy had a medical payments clause with a limit of five-hundred dollars. This sum was paid to the administratrix of the deceased's estate. The probate judge ruled that this amount was free from the claim of creditors, relying on Code section 20-607, the wrongful death statute. The hospital which had provided care for the deceased appealed. The decision was affirmed.

Although the decision of the probate court was based upon Code section 20-607, the Tennessee Supreme Court's affirmance relied upon sections 26-213 and 26-214. The court regarded the question as one of first impression in Tennessee. It found that the coverage provided by a medical payments clause was "in the nature of a personal accident policy."[22] Once this determination was made, sections 26-213

18. Pillow v. Kelly, *supra* note 16.
19. *Id.* at 600, 296 S.W. at 12.
20. 373 S.W.2d 457, at 459.
21. 368 S.W.2d 289 (Tenn. 1963).
22. *Id.* at 292.

and 26-214 seem clearly controlling, although the court recalled the parable of the Good Samaritan and expressed regret that the rule of that case could not be followed.

The other decision dealing with assets available to creditors, *Martin v. Wood*,[23] is of primary interest as a matter of pleading and procedure. But the decision is based in part upon the principle that funds *in custodia legis* are not subject to execution or attachment, and can not be reached by legal process of garnishment.

The action was brought by the administrator of the estate of a deceased person. Because one of the defendants was a non-resident an attachment issued upon a fiat of the County Judge, and garnishment was served upon the clerk and master ordering him to hold certain of the defendant's funds, which were being held by the court as defendant's share of the proceeds of the sale of land of the decedent. A default judgment was later taken against the defendant. Relying on the above stated principle, the court held the attempted attachment of the funds by garnishment and the subsequent default judgment were void.

III. MISCELLANEOUS

Two other cases should be briefly noted. In *Murdock Acceptance Corp. v. Jones*,[24] a deed of trust was executed by Jones and his wife to secure payment of "$5000.00, together with any and all other indebtedness 'now or at any time due by the undersigned'. . . ." Loans were to be made to finance Jones' used car business. At the time the deed was executed there was no existing indebtedness. The financing agreement contemplated advances to enable Jones to buy cars, which he then sold and assigned the conditional sales contracts with buyers to the lender. In the event of default on the contract, Jones was obligated to repurchase the contracts from the assignee.

When suit was brought seeking foreclosure of the deed of trust, the indebtedness owed by Jones individually was largely under the repurchase obligation. Jones and his wife contended that they did not secure these obligations, but that the only indebtedness secured was that for the original purchase of the cars or for any joint liability of Jones and his wife. This contention was upheld by the master and confirmed by the chancellor.

In reversing this decision, the court treated the question as one of interpretation of contract and subject to review on appeal.

> To limit the security under the trust . . . they should have had the deed of trust so provide in plain language. To permit these defendants to prove that 'any and all other indebtednesses now or at any time due by the

23. 370 S.W.2d 478 (Tenn. 1963).
24. 50 Tenn. App. 431, 362 S.W.2d 266 (1961).

> undersigned' actually meant only two special types of indebtednesses would jeopardize other so-called open-end deeds of trust and would not be in the public interest.[25]

The other decision[26] involved interpretation of Code section 67-5102, which requires any real estate broker, agent or salesman to give bond, "for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such real estate broker, agent or salesman . . . ."

Plaintiff had loaned money to a real estate agent purportedly to buy real estate, and default occurred in payment. In affirming a decision denying recovery against the surety on the agent's bond, the court found the loan to have been a personal one. It then held the statute in question covered only acts of an agent in transactions in which he was acting *for others.*

IV. Federal Court Decisions

During the survey period there were two relevant decisions of the federal district court for the western district. *Hux v. Butler*[27] was an action by a receiver of an insolvent corporation against the wife of the managing officer of the corporation to recover money improperly taken from the corporation and used for grain speculation in an account in the wife's name. The specnlation resulted in a loss rather than a gain. The court found that the wife did not know that the husband was acting wrongfully, and that she did not act in concert with him. On these facts it was held that the wife could not be held liable.

Lexington Housing Authority v. Continental Casualty Co.[28] was an important suretyship decision, with serious implications in the public construction contract field. The Housing Authority invited bids on a housing development. The low bidder was unofficially notified of conditional acceptance of the bid (it had to be approved by another governmental agency), but this notification was not binding because conditional and also because it was not in writing. The next day the contractor withdrew his bid and notified the Authority he was cancelling his bid bond. The Authority then sued the surety on the bid bond. It was held that the surety was not liable.

The invitation for bids, the bid of the contractor, and the bid bond all provided that the bid could not be withdrawn for thirty days following opening of the bids. The court found, however, that there

25. *Id.* at 439, 362 S.W.2d at 270.

26. Miller v. Insurance Co. of North America, 211 Tenn. 620, 366 S.W.2d 909 (1963).

27. 220 F. Supp. 35 (W.D. Tenn. 1963).

28. 210 F. Supp. 732 (W.D. Tenn. 1962), 30 Tenn. L. Rev. 450 (1963).

was no consideration for this promise by the contractor. The court then relied on the general principle that a surety is not liable unless the principle is liable. It reasoned that the contractor was free to withdraw its bid and did so before acceptance. As the contractor did not become bound, neither did the surety.

The decision largely discussed the contractor's right to withdraw its bid and gave no consideration of the possibility of the surety being liable even though the principal was not bound to the construction contract. This approach seems to overlook the purpose of the bid bond, which is to "guarantee the good faith of the bidder, *i.e.*, that if awarded the contract within the time stipulated, he will enter into the contract. . . ."[29] Since the purpose of the bid bond is to protect against the contractor's not becoming liable, the case falls within a recognized situation where the surety is usually bound though the principal is not—where the purpose of having the surety is to protect against the principal's not becoming liable.

29. SURETY ASSOCIATION OF AMERICA, BONDS OF SURETYSHIP 23 (1959).